



# The Treaty of Lisbon after the Second Irish Referendum

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In a referendum on 2 October 2009 the Republic of Ireland voted by 67.1% to 32.9% in favour of ratifying the *Treaty of Lisbon*, having voted against its ratification in June 2008. Politically, the second vote was predicated on concessions agreed by the European Council in December 2008 and confirmed in June 2009 as “guarantees” to be formalised in a protocol attached to the next accession treaty. The positive Irish vote was welcomed by the EU institutions and other Member States, but Poland and the Czech Republic still have not completed ratification. This paper looks at the background to the referendum and other ratification developments.

Vaughne Miller

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## Summary

The *Treaty of Lisbon* was concluded in Lisbon, Portugal on 19 October 2007 by the 27 European Union Member State governments meeting as an informal European Council, and signed on 13 December 2007. The Lisbon Treaty amends the *Treaty Establishing the European Community* (TEC) and the *Treaty on European Union* (TEU), providing *inter alia* new institutional structures and voting procedures, a permanent President and a foreign and security policy position, legal personality for the Union and new Treaty amendment procedures. This Treaty, like all amending treaties, must be ratified by all EU Member States according to their constitutional requirements (Article 48 TEU), in order to come into force.

In June 2008 the Irish Republic voted against ratifying the *Treaty of Lisbon*, and although the Treaty had received parliamentary approval in all Member States, three others apart from Ireland - Germany, the Czech Republic and Poland - also had problems with ratification.

In December 2008, after a period of consultation and discussion under the French and Czech EU Presidencies, Member State governments decided to offer Ireland concessions in the form of Declarations that would be incorporated into a legally binding protocol and attached to the next accession treaty, expected to be that of Croatia or Iceland.

In June 2009 Germany's Constitutional Court ruled that the Lisbon Treaty complied with the German Constitution but that the "Accompanying Laws" which were designed to strengthen the rights of the German *Bundestag* and *Bundesrat*, were not compatible and would need to be amended. New legislation was in place at the end of September 2009, allowing ratification to be completed. The Czech and Polish Governments decided to wait for the outcome of the second Irish referendum before taking further steps towards ratification.

In Ireland the governing coalition parties, Fianna Fáil (FF) and the Greens, and the two main opposition groups, Fine Gael (FG) and Labour, together with the Irish Congress of Trade Unions, business groups and the Irish Farmers Association, supported ratification of the Lisbon Treaty. Sinn Féin, Libertas, Catholic and pro-life groups opposed the Treaty. Opinion polls in the immediate run-up to the referendum showed a majority in favour of ratifying.

In the Irish referendum on 2 October, with a turnout of 58%, 67.1% voted in favour of the Lisbon Treaty and 32.9% voted against, representing a 20.5% swing to the yes side overall since June 2008 referendum.

The British Government welcomed the positive referendum result. Gordon Brown said it was "good for the UK and good for Europe" and meant that the EU could "work together to focus on the issues that matter most to Europeans - a sustained economic recovery, security, tackling global poverty, and action on climate change".<sup>1</sup> The Conservative leadership had pledged to hold a referendum on Lisbon if the Conservatives won the next general election and if the Treaty had not been ratified in all Member States. If Lisbon had been ratified by all, a Conservative government would seek to negotiate a repatriation to national legislatures of certain matters decided at EU level. Nick Clegg, the Liberal Democrat Leader, said the result "finally puts to rest years of wrangling over Europe's future and paves the way for a stronger and more democratic European Union".<sup>2</sup>

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<sup>1</sup> *EurActiv* 3 October 2009 at <http://www.euractiv.com/en/future-eu/resounding-irish-eu-lisbon-treaty/article-186051>

<sup>2</sup> 4 October 2009 at <http://www.nickclegg.com/2009/10/irish-yes-vote/>

The Polish President intends to sign the Treaty shortly and thereby complete ratification, although there have been suggestions that he might use his leverage to gain concessions before signing. It is not yet clear whether the Czech President will continue to withhold his endorsement of the Treaty and whether a Senate challenge in the Constitutional Court will further delay or prevent ratification in the Czech Republic.

## 1 Introduction

The *Treaty of Lisbon*, initially known as the “Reform Treaty”, was concluded in Lisbon on 19 October 2007 by EU Member State governments meeting as an informal European Council, and was signed on 13 December 2007. The Lisbon Treaty amends the present *Treaty Establishing the European Community* (TEC) and the *Treaty on European Union* (TEU). This Treaty, like all amending treaties, must be ratified by all 27 European Union (EU) Member States according to their constitutional requirements in order to come into force (Article 48 TEU). If the Lisbon Treaty cannot be implemented the EU will continue to work on the basis of the present Treaties as amended by the *Treaty of Nice* in 2000.

Although the Lisbon Treaty received parliamentary approval in all Member States, four Member States had problems with ratification – Ireland, Germany, the Czech Republic and Poland.<sup>3</sup> The latter two made their ratification of the Treaty conditional upon its ratification in Ireland. In Germany the Treaty was the subject of a Constitutional Court process. Ireland was the only EU Member State to hold a referendum on the *Treaty of Lisbon*. As a result of a Supreme Court ruling in 1987,<sup>4</sup> under Irish constitutional law, a significant amendment to the EC Treaties requires an amendment to the Irish Constitution and constitutional amendments must be approved by referendum. Previous Irish referendums on EU Treaties have been as follows:<sup>5</sup>

| Date            | Subject              | Electorate | Total poll         | For (%)           | Against (%)     |
|-----------------|----------------------|------------|--------------------|-------------------|-----------------|
| 10 May 1972     | European Communities | 1,783,604  | 903,439 (50.7%)    | 724,836 (84.6%)   | 131,430 (15.6%) |
| 26 May 1987     | Single European Act  | 2,461,790  | 1,085,304 (44.1%)  | 755,423 (69.9%)   | 324,977 (30.1%) |
| 18 June 1992    | Maastricht Treaty    | 2,542,840  | 1,457,219 (57.3%)  | 1,001,076 (69.1%) | 448,655 (30.9%) |
| 22 May 1998     | Amsterdam Treaty     | 2,747,088  | 1,543,930 (56.2%)  | 932,632 (61.7%)   | 578,070 (38.3%) |
| 7 June 2001     | Nice Treaty          | 2,867,960  | 997,836 (34.8%)    | 453,461 (46.1%)   | 528,478 (50.4%) |
| 19 October 2002 | Nice Treaty          | 2,923,918  | 1,446,588 (49.5%)  | 906,317 (62.9%)   | 534,887 (37.1%) |
| 12 June 2008    | Lisbon Treaty        | 3,051,324  | 1,621,037 (53.13%) | 725,451 (46.6%)   | 862,415 (53.4%) |

The Nice Treaty was endorsed in a second referendum after all Member States had agreed a declaration acknowledging Ireland's policy of military neutrality and confirming that the Nice Treaty would not affect this.

<sup>3</sup> See Standard Note SN/IA/5147, [The Lisbon Treaty: ratification issues in Ireland, Germany, Poland and Czech Republic](#) 14 August 2009

<sup>4</sup> *Crotty v. An Taoiseach*, legal action taken in 1987 by Raymond Crotty, historian and social scientist, against the Irish Government. Ruling at <http://www.bailii.org/ie/cases/IESC/1987/4.html>. For further information on the first Lisbon referendum in Ireland, see Research Paper 08/66 30 July 2008, *The Treaty of Lisbon: an Uncertain Future*.

<sup>5</sup> *EurActiv* 20 May 2008, up-dated 23 September 2009 at <http://www.euractiv.com/en/future-eu/irish-eu-treaty-referendum/article-172508>. For information on the first Irish Nice referendum see Research Paper 01/57, *The Irish Referendum on the Treaty of Nice*, 21 June 2001.

Although the 2008 negative result was not entirely unexpected, the reaction from the EU institutions and other Member States was one of despondency. The Irish Foreign Affairs Minister, Micheál Martin, said that the people's decision had to be respected, that Ireland and the EU would have to “chart a way through” and that it was “far too early for proffering any solutions or proposals”.<sup>6</sup> At the General Affairs and External Relations Council (GAERC - foreign ministers) meeting on 16-17 June 2008 Micheál Martin was asked to explain why the electorate had voted against the Treaty, but the reasons were at that point far from clear. The GAERC President, Slovenian Foreign Minister Dimitrij Rupel, thought Member States should take time to analyse the situation and consult each other. “We regret what has happened but we do not underestimate this event. Democracies have to respect the will of the people”.<sup>7</sup> He believed the EU would overcome this “hurdle” and maintained that most Member States believed the Lisbon reforms were necessary. Mr Rupel wanted ratification to continue in those Member States which had yet to ratify Lisbon “to show that it is still alive” and to give Ireland time to consider how to proceed” with a view to finding an appropriate solution.<sup>8</sup>

When the European Council met on 19-20 June 2008 with the referendum result high on the agenda, there was a broad consensus among Member States that some time was needed to find a way forward. While the no-camp celebrated, the Slovenian Presidency asked the Taoiseach, Brian Cowen, to return to the European Council in October 2008 with an idea of how Ireland wanted to proceed.<sup>9</sup>

Meanwhile, the UK continued with ratification, completing the process on 16 July 2008.<sup>10</sup> In the midst of the search for a solution to the Irish situation, on 20 November 2008, Sweden became the 23<sup>rd</sup> Member State to complete ratification with a parliamentary vote of 243 votes in favour to 39 against with 13 abstentions and 54 absences. There was a long debate in which the opposition Left Party and the Green party tried to form a 48-vote blocking minority to postpone ratification for a year. However, this was overcome by the four parties in the centre-right government coalition and the main opposition party, the Social Democrats. The debate centred on Sweden's collective labour agreements between workers' groups and employers, and the sovereignty issue.

President Nicolas Sarkozy, representing the incoming French EU Presidency, held talks with the Irish Government about the perceived reasons for the rejection of Lisbon, with a view, according to media reports, to preparing for a second vote on the Treaty. Among the options discussed informally in political fora and the media at this point were:

- a second referendum on Lisbon in Ireland but with concessions
- abandoning Lisbon
- continuing under the present Treaties and implementing aspects of Lisbon intergovernmentally

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<sup>6</sup> *BBC News* 16 June 2008 at <http://news.bbc.co.uk/2/hi/europe/7455955.stm>

<sup>7</sup> Slovenian Presidency website press release, 16 June 2008 at [http://www.eu2008.si/en/News\\_and\\_Documents/Press\\_Releases/June/0616MZZ\\_Referendum.html](http://www.eu2008.si/en/News_and_Documents/Press_Releases/June/0616MZZ_Referendum.html)

<sup>8</sup> *Ibid*

<sup>9</sup> European Council Conclusions 20 June 2008 at [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/101346.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/101346.pdf)

<sup>10</sup> For information on the Bill linked to UK ratification, see Research paper 08/03, “European Union (Amendment) Bill (Bill 48 of 2007-08), 15 January 2008, and for information on the UK parliamentary debate on Lisbon, see RP 08/66, “The Treaty of Lisbon: an Uncertain Future”, 30 July 2008.



- continuing with ratification with a view to implementing Lisbon among the other Member States, with Ireland temporarily withdrawing from the EU
- implementing aspects of Lisbon by attaching them to the next accession treaty.

## 2 Preparing the way forward

### 2.1 The Danish experience

In August 2008 the *Irish Times* reported that senior Irish officials from the Department of Foreign Affairs and the Attorney General's office had met their Danish counterparts in Copenhagen for advice on how Ireland could opt out of certain provisions of the Lisbon Treaty in order to resolve the impasse created by the negative referendum result.<sup>11</sup> The Danes had voted against the *Treaty on European Union* (TEU or Maastricht Treaty) in 1992.<sup>12</sup> Danish concerns about the TEU were met by the adoption of opt-outs contained in the "Edinburgh Agreement"<sup>13</sup> on the main issues behind the Danish electorate's rejection of the Treaty.<sup>14</sup> The Edinburgh Agreement, which proved acceptable to voters in a second referendum and subsequently allowed Denmark to ratify the TEU, was adopted as a "Decision" of the Heads of State and Government, not of the European Council. It was not the subject of a formal Treaty amendment process under Article 48 TEU (then Article N), but was published in the Official Journal of the European Communities<sup>15</sup> and later appended to the *Treaty of Amsterdam*.

### 2.2 Analysis of the no-vote

Micheál Martin indicated to the Commission that it would be December 2008 before the Government could give an idea of its intentions.<sup>16</sup> He outlined to the European Parliament (EP) Constitutional Affairs Committee on 6 October 2008 the findings of a Government-commissioned analysis of the no-vote conducted by Millward Brown IMS. Among its conclusions were:

- 70% of the Irish population still favoured EU membership (8% against)
- The main reasons for voting no or abstaining concerned
  - lack of information about the Treaty
  - the composition of the European Commission
  - corporate tax rates
  - military neutrality and
  - abortion

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<sup>11</sup> *Irish Times* 28 August 2008 at

<http://www.irishtimes.com/newspaper/frontpage/2008/0828/1219875155770.html>

<sup>12</sup> Other examples, apart from the Danish rejection of the TEU and the Irish rejection of the Nice Treaty have been: France and the Netherlands voted against the *Treaty Establishing a Constitution for Europe* in 2005. For referendum results on EU Treaties up to the Treaty of Amsterdam see Standard Note SN/IA/2709, "European Union: treaty ratification and the use of referendums" 20 October 2003.

<sup>13</sup> See [http://www.euo.dk/emner\\_en/forbehold/edinburgh/](http://www.euo.dk/emner_en/forbehold/edinburgh/)

<sup>14</sup> See [http://www.euo.dk/emner\\_en/forbehold/](http://www.euo.dk/emner_en/forbehold/)

<sup>15</sup> "Denmark and the Treaty on European Union", OJC 348 , 31 December 1992 at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41992X1231:EN:HTML>

<sup>16</sup> *EUObserver* 9 October 2008 at <http://euobserver.com/9/26899/?rk=1>

- the profile of voters who voted against Lisbon showed that younger voters, lower socio-economic groups and women were the most opposed to the Treaty.<sup>17</sup>

The Government's strategy was to find a way forward in the light of the survey result, and while Mr Martin assured the Committee of Ireland's commitment to finding a political consensus and the right solution, he did not promise that this would be before the EP elections in June 2009. He expected that by December 2008 the Government would have a clear roadmap, which was being prepared in discussions with the French Presidency presided over by President Sarkozy, but the 2009 EP elections would be conducted under the present (Nice Treaty) arrangements.

The Taoiseach reiterated to the European Council on 15 October 2008 his hopes of finding a way to move ahead with the stalled Treaty. The *Irish Times* reported that he had agreed to a French Presidency proposal to consult the Council of Ministers' legal services on the drafting of possible declarations on Ireland and the Lisbon Treaty,<sup>18</sup> and that he was looking specifically at the structure of the Commission, EU military integration, taxation and civil rights as the "likely areas of concern".<sup>19</sup>

In November Micheál Martin talked to other EU leaders about the possibility of retaining one Commissioner per Member State. Polls had indicated that, although abortion, neutrality and taxation were issues, the loss of a Commissioner had been the electorate's major concern. However, anti-Lisbon campaigners argued that voters' concerns went well beyond those outlined by the Government and that declarations agreed by the 27 Member States alongside the same Treaty text would not change minds. The *Irish Times* reported the views of Sinn Féin and Declan Ganley, the chairman of the 2008 anti-Lisbon think-tank, "Libertas":

Libertas insisted that if the treaty text is tinkered with, the resulting "Frankenstein version of Lisbon" would not win majority support from voters.

"We believe that in any referendum, here or abroad, our message of democracy, accountability, transparency, and a prosperous, strong Europe, will trump the scaremongering and personal attacks of a vociferous minority who continue to hold democracy in contempt," added Mr Ganley.

Sinn Féin claimed the Government was ignoring the will of the people "in an effort to ensure an easy life with its European peers".

"The Government needs to go to December's summit with the firm intent of negotiating a better deal that includes a social progress clause for workers, strengthening of key vetoes on public services, taxation and international trade, the removal of all self amending clauses including Article 48, secure vetoes on all aspects of common foreign and defence policies, and the retention of Ireland's permanent Commissioner," said Sinn Féin's Lisbon campaign director Pádraig Mac Lochlainn.

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<sup>17</sup> See Department of Foreign Affairs press release at <http://foreignaffairs.gov.ie/home/index.aspx?id=74340>. The full text of the research is available at <http://foreignaffairs.gov.ie/uploads/documents/Publications/Post%20Lisbon%20Treaty%20Referendum%20Research%20Findings/final%20-%20post%20lisbon%20treaty%20referendum%20research%20findings.pdf>

<sup>18</sup> The Council legal service has provided legal formulas allowing States to opt out of parts of EC Treaties.

<sup>19</sup> *Irish Times* 17 October 2008 at <http://www.irishtimes.com/newspaper/frontpage/2008/1017/1224108326408.html>

"Obtaining declarations on a small number of issues that the Government alone perceives as central to the No vote will not be enough," he added.

Chair of the anti-Lisbon campaign group the People's Movement, Patricia McKenna, said declarations on tax, abortion and neutrality were "a devious ploy designed to dupe Irish voters into believing that our Government have somehow obtained concessions from other EU States on the Lisbon Treaty".

She said "nothing could be further from the truth".<sup>20</sup>

Declan Ganley insisted: "There will be no Protocols for Ireland over Lisbon, for that would be to reopen the Lisbon Treaty and would require all 27 EU States to ratify the new protocol, which would in effect be a new treaty."<sup>21</sup> This was a matter of some dispute (see section 6).

### 2.3 EU Sub-Committee report on Ireland's Future in Europe

In October 2008 a special sub-committee of the Oireachtas Joint Committee on European Affairs was established, with the aim of building consensus among all parties on Ireland's future in Europe. It had 12 members, including five from the Senate and both supporters and opponents of Lisbon, and sat three days a week for four weeks. It commissioned a report "to identify the range of options available to the Government regarding Ireland's relationship with the EU and in particular the Lisbon Treaty".<sup>22</sup>

The report did not recommend any particular action, but concluded that for ratification, the main option for Ireland would be a second referendum on the Lisbon Treaty modified by a joint declaration by Member States attached to the Treaty. The report stated that if the Government decided on a renewed attempt at ratification:

... it would be expected that the Government make an attempt to respond at both domestic and international level (in the latter case, in consultation and in cooperation with its EU counterparts) to a range of the criticisms and concerns expressed during the first referendum campaign.<sup>23</sup>

On 27 November the Sub-Committee published a report, "Ireland's Future in the European Union: Challenges, Issues and Options".<sup>24</sup> It concluded that

- it was "imperative that Ireland's position at the heart of Europe be maintained";<sup>25</sup>
- the people had voted "to reject ratification of the Lisbon Treaty and not the European Union";<sup>26</sup>

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<sup>20</sup> The results are analysed in the *Irish Times* 17 November 2008 at <http://www.irishtimes.com/newspaper/breaking/2008/1117/breaking40.htm> and <http://www.irishtimes.com/newspaper/ireland/2008/1117/1226700658973.html?via=rel>

<sup>21</sup> *EUObserver* 18 November 2008 at <http://euobserver.com/9/27130/?rk=1>

<sup>22</sup> "Ireland's Future in Europe: Scenarios and Implications" Gavin Barrett, Brigid Laffan, Rodney Thom, Daniel C. Thomas, Ben Tonra, UCD Dublin European Institute, by 12 November 2008 p 18 at [http://www.oireachtas.ie/documents/committees30thdail/j-europeanaffairs/sub\\_cttee\\_eu\\_12112008.pdf](http://www.oireachtas.ie/documents/committees30thdail/j-europeanaffairs/sub_cttee_eu_12112008.pdf)

<sup>23</sup> *Ibid* p. 18

<sup>24</sup> "Challenges, Issues and Options" 27 November 2009 at [http://www.oireachtas.ie/documents/committees30thdail/j-europeanaffairs/sub\\_cttee\\_eu\\_01122008-3.pdf](http://www.oireachtas.ie/documents/committees30thdail/j-europeanaffairs/sub_cttee_eu_01122008-3.pdf)

<sup>25</sup> Chapter 1 Para 44

<sup>26</sup> *Ibid* Para 45

- Ireland's "standing and influence" in the EU had diminished following the Lisbon rejection and was a threat to its national, particularly its economic, interests;<sup>27</sup>
- there was no legal obstacle to "having a referendum either on precisely the same issue as that dealt with on 12 June or some variation thereof";<sup>28</sup>
- Ratification could not be achieved by Parliament alone, which "could be interpreted as an effort to circumvent the democratic will of the people"<sup>29</sup>
- It was inadvisable to negotiate opt-outs from Lisbon, which could "potentially mean Ireland losing its right to shape and influence key policy areas" (opt-outs would also represent a material change to the Treaty, which would have implications for ratification);<sup>30</sup>
- There should be no option "that could potentially lead to Ireland finding itself on an outer or second tier of the EU".<sup>31</sup>
- A solution had to be found that kept Ireland "at the heart of Europe while respecting the democratic will of the Irish people by arranging for these concerns to be accommodated by the other Member States".<sup>32</sup>
- The media was very important for communicating Europe to the citizens of Ireland but "Poor communication between the institutions of the European Union and sections of the Irish media inhibits the ability of the media to report on European issues".<sup>33</sup>
- The EU should be promoted more actively at both EU and national levels to engage citizens more.<sup>34</sup>

The Report also recommended better scrutiny of EU decisions by the Oireachtas, citing the UK model as an example of good practice. This had little to do with ratification of Lisbon but highlighted potential shortcomings in Ireland's procedures for dealing with EU business if Lisbon came into force:

30. A formal scrutiny reserve mechanism, in line with the model used in the UK Parliament, should be introduced. This will provide more influence for the Oireachtas in the negotiating positions adopted by Irish Ministers on draft EU legislation at Council meetings. The legal, resourcing, and logistical implications need to be examined further. [...]

32. There should be a more structured arrangement for Oireachtas Committees to meet with Ministers before Council meetings to consider the Government's negotiating positions on agenda items. Ministers should also report back in writing to the appropriate Oireachtas committee on the outcome of the discussions and on specific decisions made.

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<sup>27</sup> "Challenges, Issues and Options" 27 November 2009 Paras 47 and 48

<sup>28</sup> Chapter 2 Para 41

<sup>29</sup> Executive Summary Para 16 and Chapter 2 Para 65

<sup>30</sup> ES Para 17 and Chapter 2 Para 66

<sup>31</sup> ES Para 18 and Chapter 2 Para 67

<sup>32</sup> Chapter 2 Para 69

<sup>33</sup> Chapter 3 Para 19

<sup>34</sup> Chapter 3 Paras 30-38

33. The European Affairs Committee should examine what measures could be put in place to enhance oversight of Statutory Instruments. The aim of such measures could include making sure that Ministers and Departments are strictly complying with EU decisions when bringing these decisions into effect in Ireland.

34. Regulatory Impact Assessments have to be prepared for significant EU Directives, regulations and secondary legislation as provided for in the Government's guidelines. The Sub-Committee is concerned by the low rate of compliance by Departments with the existing guidelines. The Government should ensure that compliance with the Guidelines is addressed. From now on, RIAs should be forwarded to Oireachtas Committees for consideration when significant EU laws are being considered.

35. If Statutory Instruments are being used to give effect to an EU law, the text of the instrument, or at least the heads of the instrument, should be circulated to all Oireachtas members. This would mirror the current practice of distributing all texts of draft primary legislation. This will bring more transparency to the process of giving effect to EU law and enable the members to highlight any potential problems at an early stage.

36. The Sub-Committee recommends that a new panel be constituted in Seanad Éireann for a minimum of 5 Senators to be nominated on the basis of experience in EU affairs. Senators elected from this panel would participate in the Oireachtas European Committees. They should also build relations with the Irish MEPs as well as directly with the EU institutions.

37. The Standing Orders and procedures of Dáil Éireann and Seanad Éireann should be amended where necessary to implement these recommendations. The main issues to be addressed include regular debates on EU legislative proposals and developments; enhanced powers for Oireachtas Committees; provision for participation by MEPs in some debates; and informal monthly meetings between Irish MEPs and the European Committees in the Oireachtas. These meetings between the Irish MEPs and the European Committees should take place in the week per month when the MEPs are dealing with constituency work and therefore more likely to be in Ireland.

38. As part of an improved communication strategy the Oireachtas should establish its own EU Information Office. There is a clear need for easy access to neutral information on the EU decision making process, and Ireland's role therein.

39. The current requirement in the triple lock for approval by a simple majority in Dáil Éireann should be strengthened. Dáil Éireann should be required to have a "super majority", where a two thirds majority is needed for any proposal to send Irish troops overseas on peacekeeping missions. This would provide a stronger parliamentary mandate for such decisions and enhance the role of the Oireachtas in a key area of interest to the Irish people.[...]

41. [...] Difficult decisions will have to be made but the Sub-Committee believes that these decisions are necessary to tackle the accountability deficit that currently exists when it comes to the EU and Ireland's membership. These recommendations should help to facilitate and encourage greater political

debate around EU issues. This in turn should lead to a higher level of public engagement in and understanding of the EU.<sup>35</sup>

The Sinn Féin members of the sub-committee published their own opinion and the *Irish Times* reported that Sinn Féin MEP Mary Lou McDonald<sup>36</sup> thought the sub-committee report was "simply a re-articulation of the Yes argument".<sup>37</sup>

## 2.4 Conflicting views in the run-up to the European Council

In early December 2008 the Irish internal market Commissioner, Charlie McCreevy, argued that the Irish 'no' to Lisbon ought to be respected, since the anti-Lisbon campaign had won the argument against "the might" of media and most politicians.<sup>38</sup> Some had accused Mr McCreevy of contributing to the Lisbon defeat in 2008 when he commented before the referendum on the complexity of the Treaty and admitted to having read only a simplified version of it.

Just ahead of the December 2008 European Council meeting the Irish Foreign Minister had still not clarified the Government's position on ratification. He told a meeting hosted by the European Policy Centre (EPC) on 8 December that the Government had not decided to hold a referendum, but that other ways of ratification were "fraught with risks".<sup>39</sup> He emphasised that Irish concerns would "have to be addressed in a clear and convincing manner by means of legally binding assurances".<sup>40</sup> It was also reported that the Commission President, José Manuel Barroso, backed the Irish demand of one Commissioner per Member State. This came as a surprise to many observers, given the lengths to which the Commission and Member States had gone since the "Laeken Declaration" in 2000 to agree on the principle of reducing the size of the Commission and the means to by which to achieve this reduction. Under Lisbon, from 2014 the Commission would be reduced from one Commissioner per Member State to representatives from two-thirds of Member States. However, Barroso now thought there was "empirical evidence it is possible for a commission to work with 27 members"<sup>41</sup> and indicated that on balance he would rather end the Lisbon impasse than insist on the Lisbon Commission arrangements. His view was expected to be opposed by the governments of Belgium, Germany and the Netherlands, who had insisted on a slimmed down executive, but to be supported by Italy and France and the more recent Members who viewed Commission representation as vital to their interests.<sup>42</sup>

## 3 The December 2008 European Council Agreement

### 3.1 Declarations on Ireland

On 11-12 December 2008 the European Council reached an agreement in the form of declarations by which, in return for "legal guarantees" to remedy those matters of concern to the Irish electorate, the Irish Government would "seek ratification" of the Lisbon Treaty by the end of the Commission term (i.e. end October 2009). Ireland thereby effectively agreed to

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<sup>35</sup> ES Paras 29-41 and Chapter 4

<sup>36</sup> Mary Lou McDonald lost her seat in the 2009 EP election.

<sup>37</sup> "Sinn Féin launches 'Majority View - Minority Report'" 27 November 2008 at <http://www.sfguengl.com/news/entry/966>

<sup>38</sup> *EUObserver* 5 December 2009 at <http://euobserver.com/9/27241>

<sup>39</sup> *EUObserver* 9 December 2008 at <http://euobserver.com/9/27264/?rk=1>

<sup>40</sup> *Ibid*

<sup>41</sup> *EUObserver* 9 December 2008 at <http://euobserver.com/9/27265/?rk=1>

<sup>42</sup> The Commission is supposed to act as a collegiate body, but Member States have tended to adhere to the view that having a national Commissioner is important for national interests.

hold a second referendum on Lisbon in exchange for receiving concessions from the other EU States. If there was a positive vote, Lisbon would be implemented in 2010, but there was no guarantee that Ireland would be in a position to ratify in the event of a second no-vote.

Most significantly, the concessions included a guarantee in the form of a “decision” that would be taken “in accordance with the necessary legal procedures” that each Member State would keep a Commissioner. In an article in the *Irish Times* the former EP President, Pat Cox, thought the concession on Commissioners was one of principle rather than of substance:

A key concession is the European Council's unanimous agreement to allow each member state to nominate a commissioner in perpetuity. This concession does not require a change to the Lisbon Treaty, which already provides the European Council with the right to decide the number of commissioners, subject to unanimity.<sup>43</sup>

Cox also emphasised the significance of the compromise in view of future EU enlargement:

The intention is that eventually all the states of the western Balkans will join the EU. These include Croatia, Serbia, Montenegro, Bosnia and Herzegovina, and the Former Yugoslav Republic of Macedonia, Kosovo and Albania. Their accession would under the Irish compromise bring the size of a future commission to 34. What has been agreed to satisfy Irish preferences is a significant compromise, with important implications for the commission.<sup>44</sup>

The think tank Open Europe was critical, however, of the alleged ‘binding’ nature of the agreement on the Commission, stating:

this is not a legally-binding guarantee, but a political commitment – and a rather loose one at that. It is not a guarantee in any way, because it does not bind future heads of state, who would be free to go back on it. With no guarantee that Ireland will get to keep its Commissioner indefinitely, this is a worse solution than keeping the status quo.

[...]The political agreement reached at the Council is nothing more than a loose commitment that in 2014, EU heads of state and government (who will mostly be different from those currently in office today) will take a decision to keep one Commissioner per member state. This is something that could be done anyway, if the Lisbon Treaty were in force, and in no way binds future governments to deliver on it.<sup>45</sup>

There was also a European Council pledge that the EU would not impose rules on Ireland concerning taxation, “ethical issues” (e.g. abortion, euthanasia and gay marriages) or interfere with its traditional neutrality. The Conclusions stated:

2. On the composition of the Commission, the European Council recalls that the Treaties currently in force require that the number of Commissioners be reduced in 2009. The European Council agrees that provided the Treaty of Lisbon enters into force, a decision will be taken, in accordance with the

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<sup>43</sup> *Irish Times* 12 December 2008 at <http://www.irishtimes.com/newspaper/opinion/2008/12/12/1228864714775.html?via=rel>

<sup>44</sup> *Ibid*

<sup>45</sup> 19 June 2009 at <http://www.openeurope.org.uk/research/irishguarantees.pdf>

necessary legal procedures, to the effect that the Commission shall continue to include one national of each Member State.

3. The European Council has carefully noted the other concerns of the Irish people presented by the Taoiseach as set out in Annex 1 relating to taxation policy, family, social and ethical issues, and Common Security and Defence Policy (CSDP) with regard to Ireland's traditional policy of neutrality. The European Council agrees that, provided Ireland makes the commitment in paragraph 4, all of the concerns set out in the said statement shall be addressed to the mutual satisfaction of Ireland and the other Member States.

The necessary legal guarantees will be given on the following three points:

- nothing in the Treaty of Lisbon makes any change of any kind, for any Member State, to the extent or operation of the Union's competences in relation to taxation;
- the Treaty of Lisbon does not prejudice the security and defence policy of Member States, including Ireland's traditional policy of neutrality, and the obligations of most other Member States;
- a guarantee that the provisions of the Irish Constitution in relation to the right to life, education and the family are not in any way affected by the fact that the Treaty of Lisbon attributes legal status to the EU Charter of Fundamental Rights or by the justice and home affairs provisions of the said Treaty.

In addition, the high importance attached to the issues, including workers' rights, set out in paragraph (d) of Annex 1 will be confirmed.

4. In the light of the above commitments by the European Council, and conditional on the satisfactory completion of the detailed follow-on work by mid-2009 and on presumption of their satisfactory implementation, the Irish Government is committed to seeking ratification of the Treaty of Lisbon by the end of the term of the current Commission.<sup>46</sup>

Although the Presidency Conclusions containing the agreement were not legally binding,<sup>47</sup> the declarations would be written into legally binding protocols and attached to the next EU accession treaty. Brian Cowen believed this was the “right path” and that the views of the Irish people were “being respected”.<sup>48</sup> He emphasised the “detailed work to be carried out in the months ahead” to clarify how exactly Ireland would get its guarantees, but he was hopeful that Irish citizens would eventually be satisfied with the outcome of the negotiations and support the Lisbon Treaty.

Many believed that, regardless of Lisbon, institutional reform would be necessary to enable the EU to function more efficiently as a union of 27 and to allow for further expansion, although there has been no concrete evidence for this<sup>49</sup> and the British Government has seen no great urgency for such reform. Baroness Ashton said in the Lords debate on the

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<sup>46</sup> EU Presidency Conclusions, 11-12 December 2008, at [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/104692.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/104692.pdf)

<sup>47</sup> See Memorandum submitted by Rt Hon Margaret Beckett, European Scrutiny Committee Inquiry into Preparation of European Council Conclusions and Conclusions of the Council of Ministers, “The Conclusions of the European Council and the Council of Ministers” 10<sup>th</sup> Report Session 2007–08, HC 86 at <http://www.parliament.the-stationery-office.com/pa/cm200708/cmselect/cmeuleg/86/86.pdf>

<sup>48</sup> *EUObserver* 12 December 2008 <http://euobserver.com/9/27295/?rk=1>

<sup>49</sup> See Open Europe Background Briefing on Lisbon, June 2008



June 2008 European Council that “When Croatia is ready, and if the EU expands from 27 to 28 member states, there will need to be some routine changes in the institution’s arrangements with regard to the number of MEPs and so on. We will have to look at that situation then”.<sup>50</sup>

However, the need for institutional reform had been one of the key areas identified by the EU institutions and most Member States in the past, and at the December 2008 European Council meeting transitional institutional provisions were agreed. These took account of Lisbon being implemented after the envisaged start-date of early 2009 and were set out in Declarations in Annex 1 of the Presidency Conclusions.

### 3.2 UK reactions to the Agreement

On 15 December 2008 the Prime Minister, Gordon Brown, made a statement in the House on the outcome of the European Council. He said all Member States “were agreed that there could be no change or amendment to the Lisbon Treaty and that we should proceed to ratification, with the Irish agreeing to hold a referendum within the next year”.<sup>51</sup> He confirmed that the integrity of certain national policy areas would not be affected by Lisbon and that the British Government had agreed to the retention of one Commissioner per Member State.<sup>52</sup> In the exchange that followed, Bill Cash tackled the Prime Minister about what he called the “deceitful bullying of the Irish people in these conclusions”, to which Gordon Brown replied:

The Irish brought to the EU concerns that they had expressed about the interpretation of the treaty and the treaty. We agreed that there would be an extra Commissioner, but that is within the power of the Lisbon treaty. We also agreed to reiterate what is important to us in Britain as well: the Lisbon treaty in no way affects the right of members on taxation decisions and in no way affects our defence policy. As we have a protocol on the charter of fundamental rights, it was right that the Irish be given assurances on that as well. That is what has happened. I would have thought that people in the House would support it.<sup>53</sup>

Following the statement in the Lords, Lord Strathclyde questioned the agreement on Commissioners:

Was not one purpose of the Lisbon treaty to slim the number of commissioners from one national of each member state? Can she confirm that the conclusions say that the EU will take legal action to ensure that the number will stay the same? The statement says that no legal change is required. If the text means what it says, Ireland has won concessions on tax policy, security and defence, education and social policy. However, the Prime Minister says that nothing has changed. Those statements cannot both be right. Perhaps the noble Baroness can explain.<sup>54</sup>

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<sup>50</sup> HL Deb 23 June 2008 c 1253

<sup>51</sup> HC Deb 15 December 2008 c 815 at <http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm081215/debtext/81215-0004.htm#0812153000142>

<sup>52</sup> HC Deb 15 December 2008 c 815

<sup>53</sup> c 829

<sup>54</sup> HL Deb 15 December 2008 c 663 at <http://www.publications.parliament.uk/pa/ld200809/ldhansrd/text/81215-0004.htm>

For the Government, Baroness Royall of Blaisdon insisted that the new measures “do not change the Lisbon Treaty, and the legal guarantees are in line with the red lines that we in the UK secured in negotiation on the Treaty”.<sup>55</sup>

As for whether the number of Commissioners can be changed without reopening the treaty, yes it can. The Lisbon treaty provides for a reduction in the size of the Commission to two-thirds of the number of member states from 2014, but the same article allows the European Council by unanimity to vary the number of Commissioners. I believe that that is exactly what will be done.<sup>56</sup>

Richard Corbett, then a UK MEP and Socialist Group spokesman on EU reform,<sup>57</sup> thought the outcome was a “major coup” for Ireland:

First, the Irish government can claim a notable diplomatic victory. The summit agreed that, provided the Lisbon Treaty is successfully ratified, the Commission will again be composed of one member per Member State. [...]

All governments had agreed that the size of the European Commission should be cut down, as successive enlargements of the European Union turned the Commission from a compact executive into a miniature assembly, and several governments were reported as being reluctant to give up on this reform. This is a major coup for the Irish.<sup>58</sup>

#### **4 Lisbon and the Czech Presidency**

The envisaged implementation date for the Lisbon Treaty of early 2009 was unattainable. The Czech Government, which assumed the EU Presidency on 1 January 2009, was in the awkward position of having to steer the Lisbon ratification process without having ratified the Treaty itself. Final approval required a three-fifths majority in favour in both chambers of the Czech Parliament and the signature of the President, with the latter looking problematic.

The Lower House had voted in favour of Lisbon after a first reading debate on 1 April 2008. However, that month a group of Civic Democratic Party (ODS) Senators took questions about the Treaty to the Constitutional Court and the ratification process was suspended. In October 2008, after a political defeat in regional elections in which the opposition Social Democratic Party (ČSSD) won in all 13 regions, the centre-right ODS Prime Minister, Mirek Topolánek, vowed to push forward the ratification of Lisbon by the end of 2008, in advance of the Czech Republic taking over the EU Presidency.

The Constitutional Court ruled on 26 November 2008 that the elements of the Lisbon Treaty which had been referred to it were compatible with the Czech Constitution.<sup>59</sup> On 6 December, after Prime Minister Topolánek had urged ODS members at the party congress to support the Lisbon Treaty, the eurosceptic President, Václav Klaus, announced he was severing links with the ODS, as he could no longer identify with the policies of the current leadership. Commentators pointed largely to their differences over the EU and the Lisbon Treaty.

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<sup>55</sup> HL Deb 15 December 2008 c 667

<sup>56</sup> Ibid. While this is true, there is nothing to stop the European Council agreeing at a later date to change the size of the Commission again.

<sup>57</sup> Richard Corbett lost his seat in the June 2009 EP elections.

<sup>58</sup> *EUObserver* 12 December 2008 at <http://euobserver.com/9/27296/?rk=1>

<sup>59</sup> See <http://news.bbc.co.uk/1/hi/world/europe/7749724.stm> and <http://euobserver.com/9/27183/?rk=1>

Mirek Topolánek survived a leadership contest on 8 December 2008, which many interpreted as an endorsement of his pro-Lisbon mandate.<sup>60</sup> However, the Czech Government announced in December that it would postpone ratification until February 2009, allegedly because the Treaty had to be examined by parliamentary committees. Many commentators believed Topolánek wanted more time to try and unite opposing factions in the ODS following Klaus's resignation.<sup>61</sup>

In January 2009 the Czech Presidency was reported to be "preparing a contingency plan" for the EU institutional arrangements in the event of a second Irish rejection of Lisbon.<sup>62</sup> Reports also speculated that the EU's abandoning of a plan to harmonise the corporate tax base across the EU was in order not to unsettle Irish voters ahead of a second referendum.<sup>63</sup> The Czech 'Plan B' was also reported to include an initiative to reduce the size of the Commission in line with the Nice Treaty requirement, in case Ireland voted against Lisbon again.<sup>64</sup> Doubts about the Czech Presidency were reported in a *EurActiv* article in January 2009, which looked at the activities of President Klaus, who had visited Ireland for a meeting with Declan Ganley and other prominent eurosceptics. These meetings and his outspoken euroscepticism had "prompted many politicians to raise doubts about the suitability and capacity of the Czech Republic to lead the Union".<sup>65</sup>

In 18 February 2009 the Lower House voted by 125 deputies to 61 out of 197 present in favour of ratifying Lisbon, which was widely interpreted as a sign of support for the Topolánek Government's Europe policy. However, the Senate postponed its final vote, largely, it was reported, because some Senators wanted to link its approval with ratification of the controversial US missile defence shield agreement.<sup>66</sup>

Divisions in the ODS over Lisbon led to the Government losing a confidence vote on 24 March 2009. Topolánek agreed to continue in a caretaker capacity until an interim prime minister could be appointed and the Presidents of the European Commission and the European Parliament (EP) urged the Czech Government to proceed nevertheless with ratification of Lisbon. The Deputy Prime Minister, Alexandr Vondra, thought ratification would now be more difficult, although Topolánek told the EP plenary on 25 March that the internal political situation would have no impact on the Czech EU Presidency.<sup>67</sup>

On 6 May the Czech Senate finally approved the Lisbon Treaty by 54 votes to 20. A new government of technocrats, headed by a professional statistician, Jan Fischer, took office on 8 May and presided over the rest of the Czech EU presidency.

The President's signature was still required to complete the Lisbon ratification process. Vaclav Klaus insisted that the concessions to Ireland, particularly the retention of one Commissioner per Member State, would change the Lisbon Treaty (a view contested by Jan

<sup>60</sup> He beat the Mayor of Prague and Klaus ally, Pavel Bem, by 284 to 162 votes.

<sup>61</sup> See *EurActiv* 10 December 2008 at <http://www.euractiv.com/en/future-eu/czechs-postpone-lisbon-treaty-vote-2009/article-177927>

<sup>62</sup> *EUObserver* 8 January 2009 at <http://euobserver.com/9/27360/?rk=1>

<sup>63</sup> *Prague Post* 19 January 2009

<sup>64</sup> *Irish Times* 8 January 2009 at

<http://www.irishtimes.com/newspaper/world/2009/0108/1230936761694.html>

<sup>65</sup> 13 January 2009 at <http://www.euractiv.com/en/opinion/czech-eu-presidency/article-177910>

<sup>66</sup> For information on US missile defence plans, see SN/IA/4387, [Ballistic Missile Defence: Recent Developments](#) 2 December 2008

<sup>67</sup> *EUObserver* 25 March 2009 at <http://euobserver.com/9/27850/?rk=1>

Fischer) and he continued to hesitate over ratification. Klaus told Czech radio on 20 June 2009:

I will certainly not rush ... I will certainly wait until after all those things about which I have talked about -which include a constitutional complaint by our senators - happen. The Irish have not voted again. Poland has not signed the Lisbon Treaty, and Germany has not signed the Lisbon Treaty. So I am not the last Mohican who is fighting against all.<sup>68</sup>

President Klaus also called for the 'Decision' on Ireland's concession (see below) to be ratified by the Czech Parliament, which many regarded as further tactical procrastination. The second constitutional complaint launched on 29 September, (see below) threatens to delay Czech ratification by up to six months, although recent reports suggest the Court will come to a decision more quickly than this.

## 5 The June 2009 European Council 'Decision'

Brien Cowen had told the Dáil in April 2009 that the

guarantees promised in December must be legally robust in order to reassure the public about the treaty. While I respect the fact that other member states do not wish to re-ratify the Lisbon treaty, I made it clear that, for my part, the legal guarantees will have to be attached to the EU treaties at the next possible opportunity.<sup>69</sup>

The Oireachtas reported in early June on progress in drawing up the legal guarantees:

The text of the legal guarantees necessary for the Irish Government to hold a second referendum on the Lisbon Treaty is expected to be finalised in the next 2 weeks. Consultations with all the other member states on the draft text are under way and it is hoped that substantive agreement can be reached ahead of the European Summit at the meeting of EU Foreign Ministers (GAERC) on 15/16 June. The principal difficulty for the Czech Presidency is producing a text which meets Ireland's requirements, which is also acceptable to the other member states and will not require a further ratification by member states.<sup>70</sup>

The *Irish Times* reported that European Commission Vice-President, Margot Wallström, who visited Ireland in early June, was "confident that EU lawyers would be able to find a formulation for the legal guarantees which would satisfy Ireland's requirements on Lisbon while at the same time satisfying other member states concerned that they might have to re-ratify the treaty".<sup>71</sup>

At the European Council on 18-19 June Heads of State and Government agreed on a 'Decision' on the Irish concessions to be incorporated into a protocol and ratified alongside

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<sup>68</sup> *DW-World-DE*, 24 June 2009 at <http://www.dw-world.de/dw/article/0,,4420626,00.html>. See also *Ceske Noviny* 20 June 2009 at <http://www.ceskenoviny.cz/news/zpravy/guarantees-for-ireland-change-lisbon-treaty-czech-president/383761>

<sup>69</sup> 1 April 2009 at <http://debates.oireachtas.ie/DDebate.aspx?F=DAL20090401.xml&Node=H7#H7>

<sup>70</sup> "Recent Developments in the European Parliament and the EU", Bulletin 11, May 18 - 5 June 2009 at <http://www.oireachtas.ie/documents/committees30thdail/j-euscrutiny/publications/eurecentdevelopments/Bulletin11.doc>

<sup>71</sup> 12 June 2009 at <http://www.irishtimes.com/newspaper/ireland/2009/06/12/1224248690022.html>

the next EU accession treaty (likely to be Croatia or Iceland). The text of the Decision and two Declarations were appended to the Presidency Conclusions,<sup>72</sup> which stated:

2. Having carefully noted the concerns of the Irish people as set out by the Taoiseach, the European Council, at its meeting of 11-12 December 2008, agreed that, provided the Treaty of Lisbon enters into force, a decision would be taken, in accordance with the necessary legal procedures, to the effect that the Commission shall continue to include one national of each Member State.

3. The European Council also agreed that other concerns of the Irish people, as presented by the Taoiseach, relating to taxation policy, the right to life, education and the family, and Ireland's traditional policy of military neutrality, would be addressed to the mutual satisfaction of Ireland and the other Member States, by way of the necessary legal guarantees. It was also agreed that the high importance attached to a number of social issues, including workers' rights, would be confirmed.

4. Against this background, the European Council has agreed on the following set of arrangements, which are fully compatible with the Treaty, in order to provide reassurance and to respond to the concerns of the Irish people:

(a) Decision of the Heads of State or Government of the 27 Member States of the European Union, meeting within the European Council, on the concerns of the Irish people on the Treaty of Lisbon (Annex 1);

(b) Solemn Declaration on Workers' Rights, Social Policy and other issues (Annex 2).

The European Council has also taken cognisance of the unilateral declaration of Ireland (Annex 3), which will be associated with the Irish instrument of ratification of the Treaty of Lisbon.

5. Regarding the Decision in Annex 1, the Heads of State or Government have declared that:

(i) this Decision gives legal guarantee that certain matters of concern to the Irish people will be unaffected by the entry into force of the Treaty of Lisbon;

(ii) its content is fully compatible with the Treaty of Lisbon and will not necessitate any ratification of that Treaty;

(iii) the Decision is legally binding and will take effect on the date of entry into force of the Treaty of Lisbon;

(iv) they will, at the time of the conclusion of the next accession Treaty, set out the provisions of the annexed Decision in a Protocol to be attached, in accordance with their respective constitutional requirements, to the Treaty on European Union and the Treaty on the Functioning of the European Union;

(v) the Protocol will in no way alter the relationship between the EU and its Member States. The sole purpose of the Protocol will be to give full Treaty status to the clarifications set out in the Decision to meet the concerns of the Irish people. Its status will be no different from similar clarifications in Protocols

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<sup>72</sup> See Appendix for text of Decision.

obtained by other Member States. The Protocol will clarify but not change either the content or the application of the Treaty of Lisbon.<sup>73</sup>

## 6 The legal status of the Lisbon ‘Decision’ and Protocol

### 6.1 What is a Decision of the European Council?

The “Edinburgh Agreement” was adopted as a “Decision” of the Heads of State and Government which “clarified” the TEU/Maastricht Treaty, and was not the subject of a formal Treaty amendment process. It was not ‘ratified’ in the UK in the usual way following the deposit of a treaty requiring ratification, in the form of a command paper laid under the Ponsonby Rule, as it was not regarded as a treaty, but as an international agreement not requiring ratification. The then Prime Minister, John Major, said on his return from Edinburgh:

we agreed a solution to the issues raised by the Danish Government following their referendum. The solution is binding in international law. It does not in any way change the Maastricht treaty or require a new round of ratification in member states. It provides an interpretation of the treaty which Prime Minister Schlüter believes will enable him to hold a second referendum in Denmark in the spring. It has been welcomed by all seven parties that drafted the original Danish document.<sup>74</sup>

The Foreign Office Minister, Alistair Goodlad, said the decision was “an international agreement binding on the parties to the Treaty on European Union”. It did not require ratification and there was therefore no depositary state, the authentic text being held by the Council Secretariat.<sup>75</sup> He added, in response to further questioning from Nigel Spearing:

The decision [...] was not taken by the Edinburgh European Council but by the Heads of State and Government meeting within the European Council. It is an agreement binding in international law between the parties to the Treaty on European Union. It constitutes an agreement, in the sense of Article 31 of the Vienna Convention on the Law of Treaties, for the purposes of interpretation of the Treaty on European Union.<sup>76</sup>

Although the Edinburgh Agreement was presented to the Danish electorate as containing significant concessions that would enable voters to reconsider their opposition to the TEU, many commentators and other EU governments saw it rather as a way of interpreting or clarifying the TEU on the issues of concern to Danish citizens, *but legally binding nevertheless*. With regard to Economic and Monetary Union, the agreement confirmed a right that had already been agreed in the TEU. Camilla Hersom wrote in 2004:

It was clearly indicated by the Member States that the decision *is* meant to be legally binding, even if it is remarkable that the consent of the Member States

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<sup>73</sup> 11225/2/09 REV 2, 10 July 2009, Presidency Conclusions, European Council 18/19 June 2009 at [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/108622.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/108622.pdf)

<sup>74</sup> HC Deb 14 December 1992 cc 23-4 at <http://hansard.millbanksystems.com/commons/1992/dec/14/european-council-edinburgh>

<sup>75</sup> HC Deb 17 December 1992 c 356.

<sup>76</sup> Ibid

was not to be expressed by means of ratification insofar as signature was found sufficient.<sup>77</sup>

The status of the Decision was raised in a Commons debate on the TEU in January 1993, when Bill Cash asked about its legality and justiciability:

I wish to refer to the recent statement of Chancellor Kohl of Germany of Monday 4 January with respect to the Edinburgh summit, which has direct relevance to the questions arising on title II. He said: the leaders of the European Community expressed their sympathy for Denmark's special reservations, but decided not to change the Maastricht treaty. Reopening negotiations was not, and is not, on our agenda.

He continued: In Edinburgh we therefore could go no further than to clarify the relevant treaty clauses to respond to the main Danish concerns. This purely declaratory 'decision' neither changes nor complements the treaty and therefore does not require ratification by member states. It was with that in mind that I raised the question whether the Attorney-General could or should come to the House—I believe that he should to explain to us precisely the nature of the decisions taken in Denmark. Undoubtedly there are seriously conflicting opinions. Eminent Queen's counsel believe that the Danish decision was not binding, and the view has been expressed that the matter is being dealt with by an international legal obligation outside the treaty. Indeed, that is what the Government claim.

A major question arises that turns on the nature of the legal commitment, if it be a commitment at all; I believe that it is not. This will ultimately determine the relevance of the Edinburgh summit and the decision that was taken, with vast consequences for the United Kingdom, the Danish people and Europe as a whole. We do not want the treaty ratification procedure to proceed in a state of obscurity and confusion. We want to get the thing out into the open. Accordingly, I believe that it would be important for the Attorney-General—I have written to him and to my right hon. Friend the Prime Minister, enclosing a copy of a legal assessment that has been produced by some eminent Queen's counsel, to ask for their opinions—to clarify the matter. I have asked my right hon. and learned Friend and right hon. Friend to give me their opinions in writing. [...]

That is where the problem lies. We are talking about the ratification of a treaty. We are dealing with the future of the European Community. Title II amends the whole of the treaty of Rome over a wide range of matters which are set out from page 9 to page 60 of Cm. 1934. All those matters are affected by the legal status of the decisions that are being taken, provided that they are being taken in a proper constitutional manner that can stand up in relation to the European Community itself.

It is no good Governments and others going round, in the belief that they can cobble together decisions on pieces of paper, picking a little bit from one pigeon hole of international law and a little bit from another, nesting here and nesting there. We must know the precise impact of the treaty. The purpose of my opening with Chancellor Kohl's remarks is to illustrate the point that there is no clear understanding, even among the leaders of Europe, of precisely what was decided at Edinburgh.

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<sup>77</sup> *Who are the Europeans Now?* Ed Edward Moxon-Browne, "European citizenship and the search for

Nigel Spearing pointed to the “conundrum” of the “change with no change”:

Incidentally, this is of importance in respect of the Edinburgh decision, because the Edinburgh European Council was not the intergovernmental body which made the decision. There is a fine but important distinction to be made.[...] What does the Edinburgh decision do? Does it modify political union? I should have thought that it must; otherwise Mr. Schluter would not have been able to go back to Copenhagen satisfied that he had enough to be able to recommend a second round in Denmark. It must make some change. On the other hand, we are told that the decision does not change the wording of the treaty. If that is so, how can it have a different effect? I should like the Minister to explain that conundrum when he replies.

Many people say that the decision makes no difference. Earlier in the debate the hon. Member for Stafford (Mr. Cash) quoted the German Chancellor and I shall do so again. In the Financial Times on 4 January 1993 the Chancellor is quoted as saying: the European Community expressed their sympathy for Denmark's special reservations, but decided not to change the Maastricht treaty. Reopening negotiations was not, and is not, on our agenda. I do not know who "our" is. Presumably it does not include Denmark. He continued:

In Edinburgh we therefore could go no further than to clarify the relevant treaty clauses to respond to the main Danish concerns. This purely declaratory 'decision' neither changes nor complements the treaty, and therefore does not require ratification by member states. I think that everyone who is present now was present when, in reply to a point made by one of my hon. Friends, the Minister—having received some information—confirmed that declarations were not legally binding. There may be a problem in the translation, but it is clear that Chancellor Kohl does not want the declaratory decision that we are discussing to be legally binding in the sense that we have been told it is. [...]

Mr Spearing also asked about the matter of ratification:

Having asked questions about the declaration, I discovered that it did not need ratification. I was told by the Minister of State, Foreign and Commonwealth Office—a junior Minister—“The decision does not require ratification”. He went on to say that the decision had been made not by the European Council, but by Heads of State and Government meeting within the European Council.”— [Official Report, 17 December 1992; Vol. 216, c. 356.] As recently as 11 January, I asked the Prime Minister who had signed the decision, on behalf of all the nations involved. The Prime Minister replied:

The decision relating to Denmark was not signed.”— [Official Report, 11 January 1993; Vol. 216, c. 554.] [...] Why did no one sign that decision? One would have thought that, if it is to be effective and applicable in international law—as the Prime Minister told us several times that it would be on 14 December—all possible steps would have been taken to ensure that.

[...] What was agreed was an intergovernmental binding decision, not a treaty. There is a clear distinction between the two.”— [Official Report, 14 December 1992; Vol. 216, c. 37.] I do not see a clear distinction between an intergovernmental, binding decision and what we know as an international treaty. Perhaps I had better ask the Prime Minister about that. It seems that we are in dangerous waters.[...] If the Prime Minister is to be believed, they effectively changed the nature of the treaty, which is not to be ratified by the

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legitimacy: the paradox of the Danish case”, Camilla Hersom, 2004.



House or any other assembly of the people of the member states. If the Prime Minister is right and the nature of the change is justiciable, the treaty was changed —changed overnight by a group of people sitting in Edinburgh and deciding the way that the treaty should be changed.

It is not just a question of legislation. They do that in the Council, probably every week. It is not just the justiciability of the European Court or tax—they have those already. It is a matter of changing the effective constitution of the union. If that can be done virtually overnight by people sitting in Edinburgh, doing a deal, and changing the constitution of the total union that may be, surely that strikes more of the philosophy of ancient Rome than of the revolutionary and forward-looking philosophy that drove the people of Philadelphia into a different sort of constitution—had it been otherwise, I might not be speaking like this today.<sup>78</sup>

Martin Howe, Michael Shrimpton and Leolin Price published an interesting Legal Assessment of the Edinburgh Decision in December 1992 in which they considered the nature of the Decision:

The second question of form is that the “Decision” does not purport to be a decision of the European Council, as such, at. Instead, it purports to be a “Decision of the Heads of State and Government, Meeting within the European Council”. This is a distinction of substance: the European Council includes within it additionally the President of the Commission, not as a mere observer but as a full member of the European Council (Single European Act, Article 2; Maastricht, Article D). A decision reached without the concurrence of the President of the Commission (which concurrence he presumably did not wish to give) is not therefore a decision of the European Council for formal legal purposes under the Treaties.

Even if it were, the European Council does not have formal legal powers either to issue interpretations of the Treaties, or still less to alter, vary or suspend provisions of the Treaties. It has we understand been suggested by the British and Danish governments that this “decision” can have binding legal effect as an inter-governmental agreement. It is open to question whether what purports to be a “decision” of a body or institution will necessarily count as if it were a legal agreement between the persons or parties participating in the “decision”.

However, even setting this doubt as to form aside, it is clear beyond doubt that such an “intergovernmental agreement” cannot amend substantive Community law. It is also open to the gravest question whether such an informal intergovernmental agreement can substantively amend the parts of the Maastricht Treaty which are not part of Community law. [citation from *Van Gend en Loos* 1963 about the nature of EC law]

It follows from the fundamental nature of Community law, as being more than an agreement between the member states, that the Member States cannot alter Community law save in the modes authorised by the Treaties. These modes include formal Treaty amendments under Article 236 [now Article 48TEU) ....., or decisions of the Council of Ministers under specific Treaty powers and after following prescribed legislative procedures, which require a “proposal” from the Commission.

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<sup>78</sup> Extracts from HC Deb 13 January 1993 cc935 – 1011 at <http://hansard.millbanksystems.com/commons/1993/jan/13/treaty-on-european-union-1>

Whatever effect an “intergovernmental” agreement might be contended to have in terms of binding *governments*, it could not deprive either the Community institutions or companies or individuals of rights or duties to take advantage of or to enforce Community law. For example, the Commission would have both a right and a duty to take action to secure observance of Treaty obligations by Member States under Article 169 of the Rome Treaty. An agreement between governments could not prevent the Commission from taking action, nor would it be recognised by the Court as validly negating a Treaty obligation. Similarly, an intergovernmental agreement could not act as a barrier to an action brought to protect private rights arising under Community law from a Treaty obligation.

Groups of representatives of the member governments are simply not authorised to alter Community law, and the Edinburgh “decision” would simply not be recognised by the European Court as having the power to do so. The context of Community law is not merely a private matter between governments, but directly concerns peoples and the supranational institutions established under the Treaties. Article 4 of the Rome Treaty expressly provides that each of the institutions shall act within the powers conferred on it by the Treaty.

When a protocol on the Lisbon Treaty and Ireland was mooted, the Liberal Democrat MEP, Andrew Duff, told the *Irish Times* in April 2009 that “Adding this protocol to the Croatian accession treaty would leave the treaty wide open to attack in the courts” because the procedure for revision of the Treaties under Article 48 TEU was different from that governing accession treaties.<sup>79</sup> According to Duff:

... the procedures to allow for a general revision of the European treaties were different and the insertion of an Irish protocol into the EU treaties may have to wait for a new EU reform treaty to be drawn up and ratified.

He cited the example of Denmark, which had to wait five years before the guarantees and opt-outs it received after its No vote against the Maastricht treaty in 1992 were embedded in the EU treaties. The Danish guarantees were finally embedded in the EU treaties by means of the Amsterdam Treaty.<sup>80</sup>

## 6.2 Irish Sub-Committee views on protocols and declarations

Under international law protocols have the same legal status as the treaty to which they are attached and are part of that treaty, whereas declarations have only political weight. In its November 2008 report on the future of Ireland in the EU, the sub-committee of the Joint EU Committee had considered the merits and problems of protocols and declarations as options for securing guarantees for Ireland, acknowledging that both could pose difficulties for the other Member States:

43. Protocols have the same status as treaty provisions and therefore their introduction represents a kind of mini renegotiation of the Treaty rather than a wholesale renegotiation. However, there are difficulties to a protocol based approach. As protocols have the same status as treaty provisions, each Member State would probably have to re-ratify the treaty. This would likely be strongly resisted by those Member States where the initial ratification process was a difficult one to begin with. Such an approach might also be rejected where such protocols would generate comparable demands in other Member

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<sup>79</sup> *Irish Times*.com 2 April 2009 at <http://www.irishtimes.com/newspaper/world/2009/0402/1224243854498.html>

<sup>80</sup> *Ibid*

States for unique treatment, thus leading to a wider unravelling of the Lisbon Treaty.

44. Declarations are formal statements by one or more of the Member States of their intentions or understanding in signing, and subsequently ratifying, a treaty. Declarations can range from simple statements of political intent to legally binding interpretations of Treaty provisions. Ireland secured a declaration for the Nice Treaty dealing with the protection of Ireland's traditional policy of military neutrality. In the case of the Lisbon Treaty, a declaration by Ireland as well as by all Member States could be used as a way of clarifying some aspects of the Treaty and removing misunderstandings in regard to its provisions.

45. A declaration could be the instrument used to deal with the issue of the Commissioner. A declaration from all the Member States as well as an Irish declaration, each reinforcing the other, could be agreed that would commit the Member States to trigger the clause in the Lisbon Treaty allowing for the retention of the right of every Member State, including Ireland, to nominate a Commissioner. This option is not without its difficulties and may prove to be politically unachievable. It presupposes a willingness on the part of the other Member States to abandon the decision to reduce the size of the Commission in the interests of solving the predicament created by the referendum result. Member States may be reluctant to pick out one aspect of a Treaty which they view as a carefully balanced package of reforms.<sup>81</sup>

### 6.3 The Crossick blog

In a blog initiated by Stanley Crossick, founder of the European Policy Centre and a commentator on EU policies, on 5 April 2009, there was an exchange of views on Andrew Duff's view of the legality of the proposed protocol. Crossick noted:

The question arises, however, whether it is legally possible to add to an accession treaty an Irish-specific protocol containing such legal guarantees, or whether only issues pertaining to a state's accession may be dealt with. [...] If an accession treaty is not used, the legal implementation would have to await a new EU treaty to be drawn up and ratified. The 'Irish Protocol' could, of course, be ratified by the Member States at the same time as, but separate from, the Croatian Treaty of Accession. In either case, ratification is not guaranteed. [...]

The objection raised is fascinating for lawyers but may not have any political or practical relevance. The procedure adopted by the institutions and Member States can only be invalid if (a) a case is brought before the European Court of Justice (ECJ) and (b) the Court strikes down the procedure.<sup>82</sup>

Crossick outlined earlier precedents for the EU institutions and Member States "living with legally unsatisfactory situations": the provisions relating to qualified majority voting, for example, which were not entirely implemented because of the so-called "Luxembourg

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<sup>81</sup> Paras 43-5 at [http://www.oireachtas.ie/documents/committees30thdail/j-europeanaffairs/sub\\_cttee\\_eu\\_01122008-3.pdf](http://www.oireachtas.ie/documents/committees30thdail/j-europeanaffairs/sub_cttee_eu_01122008-3.pdf)

<sup>82</sup> Blogactiv (Stanley Crossick) at <http://crossick.blogactiv.eu/2009/04/05/can-irish-protocol-be-added-to-croatian-accession-agreement/#comment-2790>

Compromise".<sup>83</sup> He concluded that it was unlikely that anyone would challenge the legality of such a protocol at the European Court of Justice (ECJ), and that even if someone did, the ECJ was unlikely to strike the provisions down.

Professor Steve Peers of the University of Essex responded on 7 April 2009, suggesting the solution of a new treaty drawn up as both a Treaty amendment (under Article 48 TEU) and an accession treaty (under Article 49 TEU):

The position of the ECJ is not quite the end of the issue - because doubts about the legality of the process might lead to reluctance to ratify the treaty in national parliaments, or challenges before national courts to the legality of ratification of the treaty, of the 1980s case that started the whole saga of Irish referenda off in the first place. There is also the point that there are two different legal bases for accession treaties and Treaty amendments (Arts 48 and 49 TEU), which entail different decision-making processes to some extent. I think the best solution is to draw up a single treaty based on those two legal bases, which encompasses both a Treaty amendment and an accession treaty simultaneously.<sup>84</sup>

H de Waele, a lawyer from Radboud University Nijmegen in the Netherlands, questioned the ability of a national court to decide what should be included in an accession treaty. There was a precedent, however, in the ECJ case law:

There is no legal reason why a protocol pertaining to a different matter could not be annexed to the treatise that generally deals with the conditions of Croatia's accession. If Mr. Duff is however thinking about a case imitated before the EU Courts in Luxembourg, there is the precedent of the Roujansky v. Council cases seems applicable (T-584/93 and C-253/94P). In these cases, the EU Courts stated that an action for annulment (ex Article 230 of the EC Treaty) cannot be staged against an EU (amendment) Treaty. The same will undoubtedly apply to challenges against accession treaties. So, if natural and legal persons have no possibility for a legal challenge, this still leaves Member States and EU institutions as possible applicants - but indeed, it would seem most strange of any of them would be attacking a treaty and protocol in court where they had an important role to play in its negotiation process. If they do not like the outcome, they can just decide not to ratify it. In sum then, as said, Mr. Duff's remarks seem slightly erroneous from a legal point of view.<sup>85</sup>

Steve Peers argued on 15 April that a challenge before a national court was indeed possible:

I agree that no legal challenge before the EU courts against such a Protocol would be admissible, but I still think there is a possibility of a legal challenge in the national courts by some individual aggrieved by European Union integration in general - cf the challenges we have seen several times in the UK, Ireland, Germany, the Czech Republic and constitutional court proceedings also in Spain and France (I may have missed some).

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<sup>83</sup> An agreement signed on 30 January 1966, providing that "Where, in the case of decisions which may be taken by majority vote on a proposal of the Commission, very important interests of one or more partners are at stake, the Members of the Council will endeavour, within a reasonable time, to reach solutions which can be adopted by all the Members of the Council while respecting their mutual interests and those of the Community".

<sup>84</sup> *Blogactiv*

<sup>85</sup> *Ibid*

The legal point is that it would NOT be possible simply to attach a protocol dealing with anything at all to the accession treaty with Croatia, because accession treaties have a particular ‘legal base’ with a specific decision-making procedure (Article 49 TEU). But a measure amending the TEC/TEU needs the ‘legal base’ of a Treaty amendment (Article 48 TEU), which entails a different decision-making procedure in some respects from accession treaties. Also in some Member States it may be arguable that a different national ratification process would be applicable for accession treaties as compared to Treaty amendments. The only solution is to use the double legal base of Arts 48 and 49 TEU at the same time, and to combine all the features of the decision-making applicable to the two different legal bases.<sup>86</sup>

On 17 April, another commentator, JL, compared the present Irish situation with the Danish one in 1992, concluding:

The Irish situation is identical in institutional terms to that of Denmark after the first failed Maastricht vote. As the Danes were looking for real opt-outs (EMU, defence and home affairs) and, insofar as can be judged, the Irish are not, the legal problem is of considerably less significance and the instigation of a debate about the requirement for a protocol an error, first on the part of the Irish government and second for Sarkozy in giving it credence in his subsequent press conference.<sup>87</sup>

Steve Peers contributed on 5 May 2009 with a solution and a warning:

There is no need for a ‘protocol to the Lisbon Treaty’ to deal with the Irish situation - as it is perfectly possible to add a protocol to the treaties by means of a separate legal process, after the Lisbon Treaty is in force. This is obviously what is being contemplated. So the issue of re-ratification of Lisbon would not arise.

Re the Danish deal at the 1992 summit, the mixture of public international law and EU law which this entailed was always highly problematic legally, and the Danes rightly addressed it properly in the Treaty of Amsterdam - they could have lost their referendum otherwise.

And anyone who thinks that there is no prospect of a national legal challenge to an Irish Protocol that is at all legally questionable is underestimating Eurosceptics and overlooking their use of national courts throughout many years of Treaty revision.<sup>88</sup>

#### 6.4 UK debate

There was relatively little parliamentary consideration of the Irish agreement. The Irish referendum was raised on 16 June during the customary Commons debate before the European Council meeting, and there was an exchange following the Prime Minister’s statement on the June European Council. Gordon Brown said the proposed protocol would offer “clarification”, would in no way alter the relationship between the EU and its Member States, would be specific to Irish concerns; would be no different in status from the UK protocols to Lisbon, and would be subject to ratification in the British Parliament.<sup>89</sup> The

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<sup>86</sup> *Blogactiv*

<sup>87</sup> *Ibid*

<sup>88</sup> *Ibid*

<sup>89</sup> HC Deb 23 June 2009 c 662 at

<http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090623/debtext/90623-0004.htm>

agreement would simply ensure that “the Irish people are sure about the application of the treaty”<sup>90</sup>

In an exchange in the House of Lords on 1 July 2009, the Minister for Europe, Glenys Kinnock, confirmed the Government’s view that Ireland would be voting on the same Treaty text the second time around:

Those guarantees do not change the Lisbon treaty; the European Council conclusions are very clear on them. The Lisbon treaty, as debated and decided by our Parliament, will not be changed and, on the basis of these guarantees, Ireland will proceed to have a second referendum in October. [...] Nothing in the treaty will change and nothing in the guarantees will change the treaty as your Lordships agreed it.<sup>91</sup>

This seemed to contradict the Irish Government’s pledge not to ask the electorate to vote on the same text they had rejected earlier. Micheál Martin had said in January 2009: “We will not be asking people to vote on the same proposition”<sup>92</sup> and in May, the Europe Minister, Dick Roche, said “Our partners understand, I believe, that we cannot and will not put the same package to our people later this year”.<sup>93</sup>

Asked about the legal status of the Irish guarantees, Glenys Kinnock confirmed that they would not be legally binding until they were written into the EU Treaties as a protocol after the Irish referendum.

... what we have in the guarantees will become binding in international law when the guarantees are translated into a protocol at the time of the next accession, which presumably will be when Croatia or Iceland comes in. Before that protocol can be ratified by the UK, Parliament must pass a Bill. As I said, Parliament will rightly have the final say.<sup>94</sup>

Giving evidence to the European Scrutiny Committee (ESC) on 2 July, the Foreign Secretary, David Miliband, reiterated that “Every head of state agrees that these guarantees do not change the Treaty”.<sup>95</sup> However, he appeared to contradict the Europe Minister when he said:

[...] I think that binding international law, legally binding, as I described it to the FAC in the meeting we had there, is right because this is an agreement between the states, it will be lodged at the UN in the way that international treaties are, and that is the sense in which it is legally binding. It does not change the Lisbon Treaty as it affects the UK. It does not require ratification to have legal effect, and that is the reason that I think the Irish proposed that we proceed in this way, first of all to a decision and then to an appending of it to the protocol. I think that is the legal explanation. I am confident however that is not the last word on the matter because I know that there are others on this Committee who have a lot of interest in this.

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<sup>90</sup> HC Deb 23 June 2009 c 666

<sup>91</sup> HC Deb 1 July 2009 c 219 at <http://www.publications.parliament.uk/pa/ld200809/ldhansrd/text/90701-0001.htm#09070164000464>

<sup>92</sup> *Irish Times* 9 January 2009

<sup>93</sup> *Irish Times* 5 May 2009

<sup>94</sup> *Ibid* c 217

<sup>95</sup> ESC Uncorrected evidence, 2 July 2009 at <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmeuleg/uc761/uc76102.htm>

The ESC pursued a line of questioning about the legality and timing of the proposed Decision and the Protocol on it, including the matter of ratification in the UK. The ESC Chairman, Michael Connarty, pointed to what he thought was a contradiction:

**Q29 Chairman:** [...] Foreign Secretary [...] can I just say to you that the statement of the Council's conclusions was that the decision gave legal guarantees that meet the Irish concerns and, quote, "is legally binding from the date the Lisbon Treaty enters into force" and I believe you have repeated that. My understanding is that under section 1 subsection 2 of the European Communities Act 1972 it cannot have legal effect until it is incorporated by national legislation. My understanding and my recall is that the Danish protocol became a protocol, and in fact, I quote Baroness Kinnock of Holyhead [...**Q30**] of 1 July 2009 saying that it becomes binding in international law when the guarantees are translated into a protocol at the time of the next accession, not when the Lisbon Treaty is ratified. So we have a contradiction here.

David Miliband denied that there was a contradiction:

It is legally binding because of the decision that was taken. A decision is legally binding in international law. It is an agreement between states. There is no argument about that. It is deposited at the UN. It can be adduced by international courts as they try to seek interpretation of the Lisbon Treaty. The decision does not change the Lisbon Treaty; it provides clarification, which we had already provided to our own satisfaction in this Parliament but which the Irish wanted further clarification about. The Danish example: the decision remained legally binding as a decision for seven years before it was appended to the 1999 Treaty. The quotation from the European Communities Act does not obviate or negate the fact that a decision of the European Council is legally binding in international law.<sup>96</sup>

Bill Cash made the point that the Edinburgh Decision in 1992 had been tackled during the parliamentary process of the Maastricht Treaty Bill, thereby providing opportunity for debate and amendment before final ratification, whereas the Lisbon Decision had been agreed after UK ratification of the Treaty and would therefore need further ratification in the UK. David Miliband insisted that the Decision was legally binding and did not necessitate any re-ratification of Lisbon. Its purpose, he reiterated, would be to "give full treaty status to the clarification set out in the decision to meet the concerns of the Irish people" and neither the decision nor the protocol changed "one jot of the Lisbon Treaty as it affects Britain and as was passed by this Parliament".<sup>97</sup>

The Foreign Secretary conceded that there could be "no guarantee that a protocol would be ratified", and there was some vagueness on the part of the Government as to why a protocol was necessary if the Decision was legally binding.<sup>98</sup> Bill Cash questioned David Miliband about the assertion in the Lords by the Minister for Europe, Glenys Kinnock, that "Everything in the guarantees has been agreed by the Parliament of this country"<sup>99</sup> and referred to a "general deceit" (subsequently changed to "chicanery") in the Government's coverage of the

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<sup>96</sup> "EU Accession: Croatia And The Lisbon Treaty: 'Legal Guarantees' For Ireland", Uncorrected evidence, 2 July 2009 at <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmeuleg/uc761/uc76102.htm>

<sup>97</sup> *Ibid* Qu 35 and 37

<sup>98</sup> *Ibid* Qu 38

<sup>99</sup> HL Deb 1 July 2009 c219 at <http://www.publications.parliament.uk/pa/ld200809/ldhansrd/text/90701-0001.htm#09070164000040>

legal position.<sup>100</sup> Asked when Parliament would have the opportunity to debate the Irish guarantees (Qu 50), Miliband replied that the protocol would be appended to the next accession treaty, implying that it would be debated at that time.<sup>101</sup> Unable to clarify the situation further, the ESC Chairman concluded that it would be up to the Irish people to decide on the guarantees and then, in the future, for the Member States to ratify the protocol to give it full treaty status “and we will look forward, obviously, to these things being worked out in the fullness of time”.<sup>102</sup>

## 7 The second Irish referendum

### 7.1 The referendum campaign

Brian Cowen told the Dáil on 8 July 2009 that the second referendum on the Lisbon Treaty would be held on Friday 2 October.

The independent Referendum Commission reduced its Lisbon Treaty advertising budget by 40% from 2008. According to *The Sunday Business Post* online in mid-September, “The commission last week began its advertising campaign with €900,000 in media spend, down from the €1.5 million it spent last year. Its overall investment in marketing and public relations will be just under €3 million”.<sup>103</sup> Nevertheless, corporate and public views from both camps were displayed on posters covering lamp-posts, road signs and public transport.<sup>104</sup>

On 5 August the Broadcasting Commission of Ireland (BCI) announced new commercial, community, institutional and temporary broadcasting guidelines (they did not mention the internet) on the allocation of air time to the different sides in the run-up to the referendum. A BCI press release summarised the changes as follows:

Firstly, the guidelines clarify that there is no requirement to allocate an absolute equality of airtime to opposing sides of the Referendum debate during **editorial coverage**. The guidelines require broadcasters to ensure that the proportion of airtime allocated to opposing sides must be fair to all interests and undertaken in a transparent manner. Secondly, the guidelines clarify the requirement to ensure that the total time allocated to **political party broadcasts** will result in equal airtime being afforded to parties that support the Referendum proposals and those that oppose them. While broadcasters are under no obligation to carry political party broadcasts, those that do must comply with the guidelines.

In line with BCI policy, a moratorium on coverage of the Referendum will come into effect from 12.01am on the morning of the 1st October until close of polls on 2nd October. During this period broadcast output must not include material which relates directly to the content of the Treaty of Lisbon and/or the constitutional amendments associated with the Treaty. This includes material pertaining to the merits or de-merits of the Treaty and/or the constitutional amendments.<sup>105</sup>

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<sup>100</sup> ESC Uncorrected evidence Qu 46

<sup>101</sup> Christopher Chope had asked in June whether the House would have the opportunity to debate and vote on the protocol before the next Irish referendum. HC Deb 23 June 2009 c 676.

<sup>102</sup> Uncorrected evidence, Qu 51

<sup>103</sup> 13 September 2009 at <http://archives.tcm.ie/businesspost/2009/09/13/story44337.asp>

<sup>104</sup> *EUObserver* 1 October 2009

<sup>105</sup> [http://www.bci.ie/news\\_information/press233.html](http://www.bci.ie/news_information/press233.html). The full text of the guidelines is available at [http://www.bci.ie/documents/ref\\_guide\\_09\\_eng.pdf](http://www.bci.ie/documents/ref_guide_09_eng.pdf).



The governing coalition parties, Fianna Fáil (FF) and the Greens, and the two main opposition groups, Fine Gael (FG) and Labour and the together with the Irish Congress of Trade Unions and the Irish Farmers Association, supported ratification of the Lisbon Treaty. Sinn Féin and pro-life groups continued to oppose the Treaty and were critical of the decision to hold a second referendum on Lisbon in spite of the rejection in 2008. The context for the second referendum was also very different from the first one. As the *EUObserver* commented:

The financial crisis has rocked the country, turning it from having a much-admired and booming economy into the economic sick man of Europe, where the bottom has fallen out of the housing market, the banks are broke, unemployment is in double figures and GDP has dropped sharply.<sup>106</sup>

### ***Pro-Lisbon***

#### *Government and parliamentary parties*

Following the announcement of the referendum date, the Irish Government launched a website, “The EU matters”, to explain how Ireland had benefited from the EU.<sup>107</sup> The Department of Foreign Affairs also launched a Lisbon Treaty site, setting out how the Government believed Irish concerns had been met by the new concessions.<sup>108</sup> The Government’s campaign was highly organised in comparison with its 2008 efforts. Emphasising the new concessions, jobs and investment, and the damage a no-vote could do to the economy and Ireland’s standing in Europe, the Government campaign was supported by prominent civil society figures, high profile businessmen, political commentators and sports stars, who joined the “We Belong” club.

On 8 September the Taoiseach appeared before the cross-party European Affairs Committee, to which the Green Party leader John Gormley and Sinn Féin leader Caoimhghin O Caolain were also invited, to explain his stance on the Lisbon Treaty with legal guarantees.<sup>109</sup> This was the first of a series of hearings with the leaders of the political parties in the run-up to the October referendum. The Labour leader, Eamon Gilmore, appeared before the EU Committee on 22 September<sup>110</sup> and the Fine Gael leader, Enda Kenny, on 24 September.<sup>111</sup> The Finance Minister, Brian Lenihan, warned on 11 September that a “second Irish rejection of the EU’s Lisbon Treaty would shatter international confidence in Ireland’s ability to deal with its economic woes and would raise the country’s borrowing costs”.<sup>112</sup>

The Green Party, which had opposed Lisbon in the first referendum, narrowly agreed to back the Treaty at its convention in mid-July.<sup>113</sup> In early September Fine Gael, the main opposition party, announced it would spend more than €300,000 on the pro-Lisbon referendum

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<sup>106</sup> 1 October 2009 at <http://euobserver.com/9/28757/?rk=1>

<sup>107</sup> <http://www.eumatters.ie/>

<sup>108</sup> <http://www.lisbontreaty.ie/>

<sup>109</sup> See <http://debates.oireachtas.ie/DDebate.aspx?F=EUJ20090908.xml&Node=H3#H3>

<sup>110</sup> See <http://debates.oireachtas.ie/DDebate.aspx?F=EUJ20090922.xml&Node=H2#H2>

<sup>111</sup> See <http://debates.oireachtas.ie/DDebate.aspx?F=EUJ20090924.xml&Node=H2#H2>

<sup>112</sup> *EurActiv* 14 September 2009 at <http://www.euractiv.com/en/future-eu/irish-spells-economic-isolation-minister/article-185386>

<sup>113</sup> See *Guardian.co.uk* 19 July 2009 at <http://www.guardian.co.uk/world/2009/jul/19/ireland-lisbon-treaty-green-party>

campaign, which would “combine outdoor media and posturing with intensive door to door canvassing”.<sup>114</sup>

### *Business groups*

The Irish Business and Employers’ Confederation (IBEC) thought the Irish concessions represented a “new deal” for Ireland.<sup>115</sup> The IBEC Director of EU and International Affairs, Brendan Butler, said “The decision is as an important first step in providing a basis for securing the ratification of the Lisbon Treaty in the autumn”.<sup>116</sup> The news release continued:

“The Treaty’s successful ratification is more important now than ever. The outcome of the next referendum will define Ireland’s future relationship with Europe, and therefore with the world at large. A positive result is vital to ensure Ireland remains a constructive and dynamic partner in Europe. That is where our interests lie and where our future rests.

“At a time of great uncertainty our focus in Ireland must be to strengthen the economy and protect jobs. The Irish rejection 12 months ago has left a question mark hanging over our relationship with the EU. It has had a detrimental effect on business relationships abroad and has weakened the hand of those we rely on to defend and promote our interests in Brussels.

“In the run up to the next referendum IBEC will energetically back the campaign to ensure that Ireland remains at the very centre of EU decision-making. This is where we have succeeded in the past and remains the only viable route to protect the national interest in the years ahead.” [...]

“A yes vote is an essential step on the road to economic recovery and will send a very positive signal to European and international investors”...<sup>117</sup>

In July the Small Firms Association (SFA) recommended a yes-vote to its members and in August the Irish Small and Medium Business Association (ISME) announced its support for Lisbon. Days before the referendum the SFA published a survey which found that three-quarters of SMEs thought rejecting Lisbon again would have a negative impact on business.<sup>118</sup> Commissioner McCreevy, in contrast to his earlier pronouncements on the need to respect the no-vote, also warned in mid-September that if Ireland rejected the Lisbon Treaty again, the country’s economy would be hit hard by a lack of international investment.<sup>119</sup>

Pat Cox, the former MEP and campaign director of “Ireland for Europe”, warned that there was no room for complacency, given the “body blows” the recession had inflicted on Ireland over the last year, and that “There are those on the No side who will seek to exploit our present uncertainty to encourage the Irish people to vote against our own interests and reject

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<sup>114</sup> *IrishTimes.com* 4 September 2009 at <http://www.irishtimes.com/newspaper/ireland/2009/0904/1224253821433.html?via=rel>

<sup>115</sup> IBEC newsroom 3 August 2009 at <http://www.ibec.ie/IBEC/Press/PressPublicationsdoelib3.nsf/vPages/Newsroom~lisbon-treaty---a-'new-deal'-for-irish-voters-03-08-2009?OpenDocument>

<sup>116</sup> IBEC newsroom, 19 June 2009 at <http://www.ibec.ie/IBEC/Press/PressPublicationsdoelib3.nsf/vPages/Newsroom~ibec-welcomes-lisbon-treaty-guarantees-19-06-2009?OpenDocument>

<sup>117</sup> IBEC 19 June 2009

<sup>118</sup> See *EurActiv* 28 September 2009 at <http://www.euractiv.com/en/enterprise-jobs/irish-business-lobby-final-push-vote/article-185804>

<sup>119</sup> *EUObserver* 21 September 2009 at <http://euobserver.com/18/28691>

the Treaty. [...] We do not plan to let them succeed".<sup>120</sup> The "Ireland for Europe" campaign, which had the support of a number of high-profile public figures, launched a website promoting a yes-vote to affirm "Ireland's position as a committed and engaged Member State".<sup>121</sup>

In spite of the severe effects of the recession in Ireland, Intel, the US semiconductor manufacturer with a large operation in Ireland, and Ryanair, the low-cost airline, along with other business leaders, argued that without the stable euro currency, Ireland might have been in an even worse economic position than Iceland.<sup>122</sup> On 27 August 2009 the *Irish Times* reported that Ryanair would "spend €500,000 on advertising and cheaper airline seats in its campaign for a Yes vote in the Lisbon referendum".<sup>123</sup> This kind of spending on the yes-campaign attracted similar criticism to that levelled against the well-funded Libertas no-campaign in 2008, with one PSE MEP, Joe Higgins, claiming that the yes side was spending "'obscene' amounts of money compared with the meagre resources of the 'no' camp".<sup>124</sup> The *Times* commented:

The role of lobbyists in raising funds in Brussels for the "yes" campaign has also been exposed. One, Eamonn Bates, sent e-mails to fellow EU lobbying firms seeking donations of up to €30,000 to help a pro-Lisbon campaign.

Mr Bates was seeking funds on behalf of Europe for Ireland, an organisation established by Irish people working in Brussels who want a "yes" result. The group plans to spend €500,000 on advertisements.

Mr Bates wrote: "Powerful and misleading campaigning against the Lisbon treaty is under way and making inroads once again. Declan Ganley, who was so destructive in the first campaign, has re-entered the public debate bringing considerable financial resources to bear.

"If your company believes in a strong EU, then now is definitely the time to contribute financially."<sup>125</sup>

Lech Wałęsa, the former Polish President and leader of the Solidarity (Solidarność) trade union, who had appeared at anti-Lisbon Libertas rallies before the EP elections, was invited to Ireland in September by Enda Kenny, the Fine Gael leader, to support the pro-Lisbon campaign. According to Polish reports, Mr Wałęsa too had problems with the Treaty, but thought it was better to vote for it and then improve it, rather than reject it.<sup>126</sup>

A group called "Europe for Ireland", chaired by Kevin Leydon,<sup>127</sup> was formed in Brussels in early September with the aim of attracting support and funding for the yes-campaign among

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<sup>120</sup> *Daily Telegraph* online 26 July 2009 at <http://www.telegraph.co.uk/news/worldnews/europe/eu/5913219/Czech-president-refers-Lisbon-Treaty-to-court.html>

<sup>121</sup> <http://irelandforeurope.ie/get-the-facts/>

<sup>122</sup> *International Herald Tribune* 22 September 2009

<sup>123</sup> <http://www.irishtimes.com/newspaper/ireland/2009/0827/1224253335655.html>

<sup>124</sup> *The Times* 23 September 2009

<sup>125</sup> *The Times* 23 September 2009

<sup>126</sup> *Polskie Radio* 20 September 2009 at

[http://www.polskieradio.pl/thenews/international/artykul116272\\_walesa\\_concludes\\_irish\\_visit.html](http://www.polskieradio.pl/thenews/international/artykul116272_walesa_concludes_irish_visit.html)

<sup>127</sup> <http://www.europeforireland.eu/>

expatriates and people of Irish descent living across Europe. However, the group failed to attract substantial funding in Europe and did not have enough to advertise in Ireland.<sup>128</sup>

On 27 September a 16-page pro-Lisbon supplement on the Treaty was placed in Irish Sunday newspapers by the European Commission, giving rise to criticism from the anti-Lisbon camp that the Commission had wasted taxpayers' money. According to the former MEP and chairwoman of the People's Movement, Patricia McKenna, this was:

an unlawful use of European taxpayers' money, since the European Commission has no competence whatever in the ratification of treaties. It is also in breach of Irish law and the principles of the McKenna judgment as established by the Supreme Court in 1995 whereby taxpayers' money cannot be used to promote one side in a referendum campaign.<sup>129</sup>

Ms McKenna said the supplement also raised concerns about the conduct of the referendum campaign and to what extent newspapers and other media outlets had been influenced by advertising revenue.

### ***Anti-Lisbon***

The failure of Libertas in the EP elections<sup>130</sup> and the pledge of its leader, Declan Ganley, not to lead another no-campaign, initially left Sinn Féin the only high-profile anti-Lisbon voice. According to the Sinn Féin (SF) leader, Gerry Adams, the party wanted a renegotiation of the Lisbon Treaty. He believed the Irish concessions were just "add-ons" with no legally binding power on other Member States, which did not change the Treaty in relation to Ireland. Mr Adams also pointed to the length of time it had taken to draw up the new Treaty and maintained it was out-of-date.<sup>131</sup> At a meeting of the party's *ard chomhairle* on 10 August SF formally backed a no-vote and announced the launch of its campaign.

On 8 September 2009 RTÉ News reported that around 135 councillors had "joined forces to reject the Lisbon Treaty today, claiming it would privatise public services and create a more militarised Europe".<sup>132</sup> The councillors, who included several representatives from Sinn Féin, three from the Labour Party, independents, and others from a group called 'People Before Profit', backed the 'Campaign Against the EU Constitution' (CAEUC). The CAEUC spokesman, Brendan Young, maintained that workers' rights would be eroded and public spending cut if Lisbon were ratified. The *Irish News* put the CAEUC numbers in perspective, stating "There are 1,627 councillors across the state, with this anti-Lisbon campaign representing less than 10% of elected representatives".<sup>133</sup>

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<sup>128</sup> See *EUObserver* 23 September 2009 at <http://euobserver.com/9/28711/?rk=1>

<sup>129</sup> *IrishTimes.com* 28 September 2009 at <http://www.irishtimes.com/newspaper/ireland/2009/0928/1224255368109.html>

<sup>130</sup> Having mounted a costly and high profile campaign, Libertas took only one seat in the EP elections.

<sup>131</sup> *Breakingnews.ie* 6 August 2009 at <http://www.breakingnews.ie/ireland/adams-no-uturn-on-lisbon-treaty-opposition-421512.html>

<sup>132</sup> *The Irish News* 8 September 2009 at <http://www.irishnews.com/break.asp?tbrk=brk&par=brk&catid=5834&subcatid=642&storyid=425608>

<sup>133</sup> <http://www.irishnews.com/break.asp?tbrk=brk&par=brk&catid=5834&subcatid=642&storyid=425608>

The no-campaign coalition, *Coir*, focused on unemployment, the alleged reduction of the minimum wage and a loss of political weight for Ireland under the Lisbon institutional arrangements.<sup>134</sup>

In mid-September Declan Ganley returned to the no-campaign, prompted by what he called the “fallacies’ pedalled by pro-Lisbon advocates which played on public fears over Ireland’s economy”.<sup>135</sup> Reports noted the funding boost Ganley’s support brought to the no-campaign.

For some Catholic groups a major concern was that Lisbon might open the door to legalised abortion, although there is no basis for this in the Treaty.

The UK Independence Party (UKIP) published a leaflet specifically aimed at Irish voters, called “The Truth about the Treaty”, in which they maintained the “legally binding guarantees” were “worthless” and just a “PR con job”.<sup>136</sup>

## 7.2 Opinion polls

According to an *Irish Times* survey on 17 November 2008, asked what voters would do if Lisbon were modified to allow Ireland to retain a Commissioner, and if other Irish concerns on neutrality, abortion and taxation were clarified in special declarations, 43% said they would vote ‘Yes’, 39% No, with 18% undecided.<sup>137</sup>

An opinion poll by the *Sunday Telegraph/Quantum Research* in early January 2009 showed a greater upturn in support for the Lisbon Treaty following the December 2008 agreement on concessions, with 55% of the 500 people asked saying they would vote for Lisbon with the December concessions, 37% saying they would vote against and 15% undecided.

In April and May 2009 opinion polls still favoured a yes-vote.<sup>138</sup> The *Irish Times* commented on three polls since early 2009:

The poll [May 2009] shows that 54 per cent would now vote Yes, an increase of two points since the last *Irish Times* poll two weeks ago, with 28 per cent saying they would vote No, a drop of one point. The number of people in the “Don’t Know” category has dropped by one point to 18 per cent.

When undecided voters are excluded, the Yes side has 66 per cent, with 34 per cent in the No camp. That compares to the referendum result last June of 53.4 per cent No and 46.6 per cent Yes.<sup>139</sup>

<sup>134</sup> The Coir claims were countered in an article by the Fianna Fáil Deputy Prime Minister, Mary Coughlan, see Department of Foreign Affairs, 11 September 2009, at <http://www.lisbontreaty.ie/speeches/2009-09-11.asp>

<sup>135</sup> *EurActiv* 14 September 2009 at <http://www.euractiv.com/en/future-eu/libertas-back-limelight-lisbon-debate-hots/article-185404>

<sup>136</sup> <http://www.euinfo.ie/uploads/file/LT2-plus-p7-rural-small.pdf>

<sup>137</sup> Irish Times/TNS mrbi poll, *Irish Times* 17 November 2008 at <http://www.irishtimes.com/newspaper/frontpage/2008/11/17/1226700659487.html?via=rel>. The poll was conducted among a representative sample of 1,000 voters in face-to-face interviews at 100 sampling points in all 43 constituencies. The margin of error is 3%.

<sup>138</sup> See polls 20 April 2009, *EurActiv* at <http://www.euractiv.com/en/future-eu/irish-support-lisbon-treaty-rise/article-181412>; 18 May 2009, *Irish Times* at <http://www.irishtimes.com/newspaper/ireland/2009/05/18/1224246810409.html>

<sup>139</sup> 1 June 2009 at <http://www.irishtimes.com/newspaper/frontpage/2009/06/01/1224247818463.html>

In July the IBEC published findings following a survey of CEOs' views on Ireland's international reputation as a result of the first Lisbon rejection:

IBEC today released the preliminary findings of a new survey of over 300 Irish CEOs from across the country, which found that 84% believe last year's Lisbon Treaty rejection damaged Ireland's international reputation. The survey also found that that over 98% of the CEOs believe that EU membership has been important to the success of Irish business. Among companies with over 50 employees the figure was 100%, while for companies with fewer than 50 employees the figure was 97.6%.<sup>140</sup>

In early September an *Irish Times* poll of 1000 voters at 100 sampling points in all 43 constituencies showed 46% support for Lisbon, a fall of 8% since the May poll. 29% would vote against, an increase of 1%, and 25% were undecided, an increase of 7%.<sup>141</sup> The report commented that "Most of those who have left the Yes camp have moved into the Don't Know category rather than shifting into the No camp".<sup>142</sup> The report summarised other poll findings as follows:

Voters were also asked if, in the light of the current economic crisis, they thought it was better to be part of the EU. A substantial 80 per cent thought it better to be part of the EU, (down 1 point since the last poll) 9 per cent thought it was not (down 1 point) and 11 per cent had no opinion (up 2 points).

Asked if they were likely to vote, 74 per cent said very likely, 13 per cent fairly likely, 2 per cent fairly unlikely, 6 per cent very unlikely and 5 per cent had no opinion.

Ninety-one per cent of Yes voters said they were very likely to vote, but among No voters the figure was 70 per cent.

Men are more likely to back the treaty than women, with 52 per cent of male voters saying they will vote Yes compared to 31 per cent No and 16 per cent Don't Know. Among women, support for the Yes side drops to 41 per cent with 26 per cent No and 34 per cent Don't Know.

In class terms, there is now overwhelming support for Lisbon among the better-off AB voters, with 68 per cent in favour and only 16 per cent against. At the other end of the social scale, 35 per cent of the poorest DE category are against with 32 per cent in favour.

Fianna Fáil voters are the most enthusiastic supporters of the treaty by a margin of 62 per cent to 23 per cent. Among Fine Gael voters there is also solid backing for the Yes campaign by a margin of 58 per cent to 23 per cent. Labour Party supporters are less enthusiastic with 43 per cent in favour and 31 per cent against.

Green Party supporters are significantly out of tune with their party on the issue with 36 per cent intending to vote No and 31 per cent Yes, despite the party's decision at a special convention to support Lisbon.

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<sup>140</sup> IBEC 27 July 2009 at <http://www.ibec.ie/IBEC/Press/PressPublicationsdoclib3.nsf/vPages/Newsroom~survey-lisbon-rejection-damaged-ireland%27s-reputation-27-07-2009?OpenDocument?OpenDocument>

<sup>141</sup> *Irish Times* 4 September 2009 at <http://www.irishtimes.com/newspaper/frontpage/2009/0904/1224253822439.html>

<sup>142</sup> Ibid

In line with their party's stance on the issue, Sinn Féin voters are strongly against the treaty, with 66 per cent intending to vote No and just 13 per cent Yes<sup>143</sup>

With the Government of Brian Cowen at a historic low in the polls and trying to adopt an austerity budget to tackle the economic crisis, there were suggestions that the electorate might vote against Lisbon to try and bring down the Government. However, polls in the last weeks before the referendum did not support this view. A poll published by the *Sunday Business Post/ Red C* on 13 September 2009,<sup>144</sup> put the Yes side on 62%. 23% would vote against and 15% were undecided.<sup>145</sup>

Fortuitously, on 19 September José Manuel Barroso announced that the Commission had approved an application from Ireland for assistance from the European Globalisation Adjustment Fund (EGF), a new fund to help workers disadvantaged by the effects of the economic crisis. The Irish application related to over 2,800 redundancies, of which 2,000 were in Dell Computers and 840 in eight of its suppliers. The grant of €14.8 million, which needed Council and EP approval, would help those made redundant to find new jobs.<sup>146</sup>

The yes-campaign took a decisive lead in the last few days before the referendum. According to a poll published at the end of September by the *Sunday Independent* and *Quantum Research* 68% voted in favour of Lisbon, 17% against with 15% undecided.<sup>147</sup> An exit poll carried out by opposition Fine Gael party of 1,000 voters from 33 locations around the country on 2 October gave around 60% in favour of Lisbon.<sup>148</sup>

### 7.3 The referendum results

Polls opened at 7 am on 2 October 2009 in the 43 constituencies across Ireland, closing at 10 pm. Voters were asked to vote 'yes' or 'no' to the question of whether they approved the proposal to amend the Constitution contained in the *Twenty-Eighth Amendment of the Constitution (Treaty of Lisbon) Bill 2009?* (which included the concessions agreed for Ireland).<sup>149</sup> Details of the referendum were as follows:

|                 |                                     |
|-----------------|-------------------------------------|
| Eligible voters | 3,132,475                           |
| Turnout         | 1,816,098 (58%).                    |
| Spoiled Votes   | 7,224 (0.4%) <sup>150</sup>         |
| <b>Yes</b>      | <b>67.1% (1,214,268)</b>            |
| <b>No</b>       | <b>32.9 (594,606)<sup>151</sup></b> |

<sup>143</sup> *IrishTimes.com* 4 September 2009

<sup>144</sup> Conducted 7-9 September among 1,000 voters nationwide.

<sup>145</sup> <http://archives.tcm.ie/businesspost/2009/09/13/story44354.asp>

<sup>146</sup> See press release 19 September 2009 at

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1336&format=HTML&aged=0&language=EN&guiLanguage=en>

<sup>147</sup> *Independent.ie* 27 September 2009 at <http://www.independent.ie/national-news/support-for-lisbon-rises-as-cowen-and-fianna-fail-enjoy-poll-bounce-1897908.html>

<sup>148</sup> *EUObserver* 2 October 2009 at <http://euobserver.com/9/28770/?rk=1>

<sup>149</sup> See <http://www.lisbontreaty2009.ie/ballot%20paper.pdf>

<sup>150</sup> See RTE News at <http://www.rte.ie/news/features/lisbontreaty/index.html> for further information.

<sup>151</sup> *Irish Times*, 3 October 2009 at <http://www.irishtimes.com/newspaper/breaking/2009/1003/breaking1.htm>

The results showed a 20.5% swing to the yes-side overall since June 2008 and clear swings in favour of Lisbon in all constituencies but two, Donegal North East and Donegal South West, which voted against, although by greatly reduced margins from 2008. The most support for the Treaty was in Dublin South, with 82% in favour, followed by Dún Laoghaire, with 81% (a 17.7% swing compared to 2008) and a turnout of 70.7%. Across all 12 Dublin constituencies support for the treaty was 69%, with a turnout of 59.3%.<sup>152</sup>

The full constituency results were as follows:

|                       |                      |                     |
|-----------------------|----------------------|---------------------|
| Carlow-Kilkenny:      | Yes: 42,499 (70.53%) | No: 17,755 (29.47%) |
| Cavan-Monaghan:       | Yes: 34,740 (61.99%) | No: 21,301 (38.01%) |
| Clare:                | Yes: 33,707 (72.32%) | No: 12,898 (27.68%) |
| Cork East:            | Yes: 31,956 (66.10%) | No: 16,387 (33.90%) |
| Cork North Central:   | Yes: 21,642 (55.81%) | No: 17,136 (44.19%) |
| Cork North West:      | Yes: 27,249 (69.53%) | No: 11,942 (30.47%) |
| Cork South Central:   | Yes: 36,040 (66.85%) | No: 17,874 (33.15%) |
| Cork South West:      | Yes: 23,764 (67.17%) | No: 11,615 (32.83%) |
| Donegal North East:   | Yes: 14,156 (48.54%) | No: 15,005 (51.46%) |
| Donegal South West:   | Yes: 15,623 (49.73%) | No: 15,794 (50.27%) |
| Dublin Central:       | Yes: 18,545 (61.94%) | No: 11,396 (38.06%) |
| Dublin Mid-West:      | Yes: 21,435 (61.49%) | No: 13,424 (38.51%) |
| Dublin North:         | Yes: 36,971 (72.68%) | No: 13,895 (27.32%) |
| Dublin North Central: | Yes: 23,692 (71.11%) | No: 9,624 (28.89%)  |
| Dublin North East:    | Yes: 21,045 (63.46%) | No: 12,117 (36.54%) |
| Dublin North West:    | Yes: 15,734 (55.04%) | No: 12,850 (44.96%) |
| Dublin South:         | Yes: 47,549 (81.67%) | No: 10,672 (18.33%) |
| Dublin South Central: | Yes: 25,854 (57.97%) | No: 18,742 (42.03%) |
| Dublin South East:    | Yes: 23,478 (78.67%) | No: 6,365 (21.33%)  |
| Dublin South West:    | Yes: 23,192 (58.91%) | No: 16,178 (41.09%) |
| Dublin West:          | Yes: 21,429 (68.50%) | No: 9,852 (31.50%)  |
| Dún Laoghaire:        | Yes: 45,917 (81.17%) | No: 10,651 (18.83%) |
| Galway East:          | Yes: 30,549 (68.11%) | No: 14,306 (31.89%) |
| Galway West:          | Yes: 31,000 (66.34%) | No: 15,732 (33.66%) |

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<sup>152</sup> *Irish Times*, 3 October 2009



|                          |                      |                                    |
|--------------------------|----------------------|------------------------------------|
| Kerry North:             | Yes: 19,543 (63.58%) | No: 11,193 (36.42%)                |
| Kerry South:             | Yes: 20,092 (66.39%) | No: 10,170 (33.61%)                |
| Kildare North:           | Yes: 32,012 (76.19%) | No: 10,002 (23.81%)                |
| Kildare South:           | Yes: 21,586 (69.72%) | No: 9,373 (30.28%)                 |
| Laois-Offaly:            | Yes: 46,624 (73.17%) | No: 17,097 (26.83%)                |
| Limerick East:           | Yes: 30,210 (67.41%) | No: 14,607 (32.59%)                |
| Limerick West:           | Yes: 23,366 (69.32%) | No: 10,343 (30.68%)                |
| Longford-Westmeath:      | Yes: 30,870 (65.64%) | No: 16,156 (34.36%)                |
| Louth:                   | Yes: 30,116 (61.02%) | No: 19,241 (38.98%)                |
| Mayo:                    | Yes: 34,056 (61.71%) | No: 21,132 (38.29%)                |
| Meath East:              | Yes: 27,822 (72.31%) | No: 10,653 (27.69%)                |
| Meath West:              | Yes: 23,103 (64.88%) | No: 12,504 (35.12%)                |
| Roscommon-South Leitrim: | Yes: 25,580 (65.97%) | No: 13,194 (34.03%)                |
| Sligo-North Leitrim:     | Yes: 21,295 (64.45%) | No: 11,744 (35.55%)                |
| Tipperary North:         | Yes: 25,768 (70.38%) | No: 10,846 (29.62%)                |
| Tipperary South:         | Yes: 22,712 (68.42%) | No: 10,483 (31.58%)                |
| Waterford:               | Yes: 30,744 (68.53%) | No: 14,116 (31.47%)                |
| Wexford:                 | Yes: 39,463 (65.20%) | No: 21,067 (34.80%)                |
| Wicklow:                 | Yes: 41,540 (70.75%) | No: 17,174 (29.25%) <sup>153</sup> |

#### 7.4 The constitutional process

The second *Twenty-Eighth Amendment of the Constitution (Treaty of Lisbon) Bill 2009* (Bill 49 of 2009) was published on 6 July 2009, and was debated and passed in the Dáil and Seanad on 8 and 9 July 2009 respectively. The target date for entry into force is 1 November 2009, so presidential endorsement was envisaged shortly after the October referendum if the result was positive.<sup>154</sup> The Referendum Commission describes the post-referendum procedure as follows:

The votes in the referendum are counted in each constituency and the results are reported to the referendum returning officer. The returning officer then issues a provisional referendum certificate which states the result of the voting in all constituencies. This is formally published in *Iris Oifigiúil* (this is the gazette in which official government information is published. It is usually published twice a week – on Tuesdays and Fridays and is available on line at [www.irisoifigiuil.ie](http://www.irisoifigiuil.ie)).

<sup>153</sup> From RTE News 3 October 2009 at <http://www.rte.ie/news/features/lisbontreaty/results.html>

<sup>154</sup> Information on the passage of the Bill with links to texts and debates is available at <http://www.oireachtas.ie/viewdoc.asp?DocID=12385&&CatID=59> and the text of Bill is at <http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2009/4909/B4909D.english.pdf>.

In the seven days following the formal publication anyone whose name is on the electoral register may apply to the High Court for leave to present a petition questioning the provisional certificate. If this does not happen, the certificate becomes final. If it shows that the majority of votes cast were in favour of the proposal, the Bill is signed by the President and the Constitution is amended accordingly. Usually, the new text of the Constitution comes into effect as soon as the President signs the Bill – that will happen in this case.<sup>155</sup>

As the referendum is held after the Bill is passed, the Constitutional Amendment Bill remains a Bill until it is converted into an Act by a positive referendum result. On the next parliamentary sitting day following a positive referendum, Tuesday 6 October 2009, the terms of the Lisbon Treaty were laid before the Dáil with a motion which was approved on 7 October.<sup>156</sup> The Senate approves the Treaty in a similar manner.

Following signature by the President, the instrument of ratification is formally deposited in Rome by the Department of Foreign Affairs. Ireland's instrument of ratification will refer to both the Lisbon Treaty and the intergovernmental Decision. Both of these will be registered with the United Nations under Article 102 of the UN Charter.<sup>157</sup>

## 7.5 Reaction to the referendum result

### *Ireland*

The Taoiseach, Brian Cowen, gave credit to the Irish people for the result and praised their determination to be at the centre of Europe. He told a press conference on 3 October that Ireland would now work with its partners in ensuring the Lisbon reforms were implemented.<sup>158</sup> Foreign Minister Micheál Martin noted that the guarantees secured by the Government had played a crucial role in the yes-vote and Finance Minister, Brian Lenihan, said the result was "an essential first step towards economic recovery".<sup>159</sup>

The Labour Party leader, Eamon Gilmore, commented that the yes-vote had been secured "despite the anger and frustration people feel at a very unpopular Government" and the Fine Gael leader, Enda Kenny, called the electorate "enlightened" and the result a triumph over "the anger of politics and the cynicism of politics".

Declan Ganley of Libertas acknowledged that the result was "a very convincing win" and commended Mr Cowen for a "masterful campaign", but he accused the yes-campaign of "playing on the fears of many voters, particular in connection with jobs and the economy".<sup>160</sup>

The Sinn Féin vice-president and anti-Lisbon campaigner, Mary Lou McDonald, did not think the yes-vote was a sign of support for the Government parties and that the people still wanted political change.<sup>161</sup> There were also further complaints from the no-side that the yes-campaign had spent ten times more than they had, including a reiteration of the allegations

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<sup>155</sup> [http://www.lisbontreaty2009.ie/lisbon\\_treaty\\_your\\_decision.html](http://www.lisbontreaty2009.ie/lisbon_treaty_your_decision.html)

<sup>156</sup> See Dáil Order paper at <http://www.oireachtas.ie/documents/op/Oct09/Business/op081009.pdf>

<sup>157</sup> Article 102 provides that all international agreements to which UN Member States are party should be registered with the UN Secretariat after their entry into force.

<sup>158</sup> *Irish Times* 3 October 2009 at

<http://www.irishtimes.com/newspaper/breaking/2009/1003/breaking23.html?via=rel>

<sup>159</sup> *Irish Times* 3 October 2009

<sup>160</sup> *Irish Times* 3 October 2009 at

<http://www.irishtimes.com/newspaper/breaking/2009/1003/breaking20.html?via=rel>

<sup>161</sup> *Ibid*

of illegal funding from the Commission and the EP. They accused the independent Referendum Commission of being a tool for the yes-campaign.

### **Outside Ireland**

The European Commission President Barroso thought the result showed “the value of European solidarity” and showed the positive response the EU had brought to the economic and financial crisis.<sup>162</sup> The EP President, Jerzy Buzek, although pleased with the result, said the EU now had to work to overcome the difficulties raised by the energy issue, the unemployment rate, immigration and demography.

The German Chancellor, Angela Merkel, drew attention to the fact that the yes-vote coincided with German unification day, while the French President, Nicolas Sarkozy, described the result as “very satisfying for all Europeans” and decisive in moving towards the implementation of the Treaty.

The Swedish Presidency expressed optimism that it is only “a matter of a limited time before we can finally push the button for the better European cooperation that the Lisbon Treaty can give us”.<sup>163</sup>

The British Prime Minister, Gordon Brown, was reported to have said the result was good for the UK and Europe and that Europe could now “work together to focus on the issues that matter most to Europeans - a sustained economic recovery, security, tackling global poverty, and action on climate change”.<sup>164</sup>

The UK Independence Party (UKIP) leader, Nigel Farage, said the referendum had been an “absolute travesty of democracy” and compared it to a corrupt election in Zimbabwe or Afghanistan. He maintained that the yes-campaign had had a “wall of money” and that the courts and broadcasting authorities had conspired against the no-campaign.<sup>165</sup>

President Václav Klaus thought the Irish result was “tarnished” because it was a “repeated referendum.”<sup>166</sup>

The Irish yes-vote prompted the Turkish Foreign Minister, Ahmet Davutoglu, to renew efforts for Turkey’s accession to the EU, which would be facilitated by the new institutional arrangements in Lisbon. He met the Commission President, the Enlargement Commissioner and the Swedish Foreign Minister on 2 October to press the Turkish case.<sup>167</sup>

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<sup>162</sup> *Irish Times* 3 October 2009 at <http://www.irishtimes.com/newspaper/breaking/2009/1003/breaking27.html?via=rel>

<sup>163</sup> *Ibid*

<sup>164</sup> *RTE News* 3 October 2009 at <http://www.rte.ie/news/2009/1003/eulisbonreax1.html>

<sup>165</sup> *Irish Times* 3 October 2009 at <http://www.irishtimes.com/newspaper/breaking/2009/1003/breaking34.htm>

<sup>166</sup> *RTE News* 3 October 2009 at <http://www.rte.ie/news/2009/1003/eulisbonreax1.html>

<sup>167</sup> *EurActiv* 5 October 2009 at <http://www.euractiv.com/en/enlargement/turkey-rides-irish-promote-eu-entry/article-186059>

## 8 What happens now?

### 8.1 Ratification progress and issues

#### **Germany**

On 8 September and 18 September 2009 respectively, in response to the Constitutional Court ruling on the Lisbon Treaty, new laws were adopted in Germany,<sup>168</sup> paving the way for ratification of the Treaty. The new laws were published in the law register on 24 September and the President signed the ratification document on 25 September.

#### **Poland**

The Polish President, Lech Kaczynski, who had hesitated over signing the Treaty, said in September that he would complete ratification shortly after a yes-vote in Ireland.<sup>169</sup> However, reports in early October suggested he might withhold his signature for political leverage to obtain more EU funding or an important portfolio for a Polish Commissioner (the economist and former MEP Janusz Lewandowski is the Polish Commission candidate). Polish ratification has also been linked to long-standing proposals to give the Polish Parliament oversight powers over the Government in EU matters, as in Germany, although it has not been suggested that the Treaty should be reviewed by the Polish Constitutional Tribunal. The EU affairs minister, Mikolaj Dowgiewiecz, is reported to have already drafted legal proposals on this matter, which it may circulate in the coming weeks.<sup>170</sup>

#### **UK**

On 23 September 2009 it was reported that the David Cameron had written to President Klaus about his intention of holding a referendum on the Lisbon Treaty if the Conservatives were elected to government in 2010 and if ratification had not been completed by then in all the other Member States.<sup>171</sup> David Cameron also insisted that if the Treaty were ratified and in force in all Member States a Conservative government, “would not let matters rest there”.<sup>172</sup> Having previously been vague as to what exactly he would do in this situation, Mr Cameron said on the BBC’s “Andrew Marr Show” on 4 October that a future Conservative government would not hold a retrospective referendum on Lisbon if the Treaty had been universally ratified. They would not try to unpick the main Lisbon reforms, but would instead seek to repatriate decision-making powers they thought should be at national, not EU, level.

The Conservative Mayor of London, Boris Johnson, suggested on *BBC Breakfast* that the Conservatives might offer voters a “consultation” on relations with the EU rather than a referendum on the Lisbon Treaty.<sup>173</sup> William Hague, the Shadow Foreign Secretary, told Radio 4’s “The World This Weekend” that if Lisbon were ratified by all Member States, the Party would spell out exactly how they intended to proceed, and would “seek a mandate for

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<sup>168</sup> The laws were: the Act Extending and Strengthening the Rights of the *Bundestag* and *Bundesrat* in matters concerning the European Union; a Responsibility for Integration Act; the Act implementing the Amendments to the Basic Law for the Ratification of the Lisbon Treaty; the Act Amending the Act on Cooperation between the Federation and the Länder in Matters concerning the European Union.

<sup>169</sup> *EUObserver* 18 September 2009 at <http://euobserver.com/9/28682/?rk=1>

<sup>170</sup> *EUObserver* 5 October 2009 at <http://euobserver.com/9/28780/?rk=1>

<sup>171</sup> See *Daily Mail* 23 September 2009 at <http://www.dailymail.co.uk/news/article-1215421/Cameron-tries-ditch-attempt-delay-Lisbon-Treaty-referendum-letter-Czech-president.html>. It is not clear what he would do if the Treaty has been ratified by all Member States at that point.

<sup>172</sup> See *Telegraph.co.uk* 3 October 2009 at <http://www.telegraph.co.uk/news/newstoppers/politics/david-cameron/6258097/Europe-policy-pressure-grows-on-David-Cameron-as-Irish-vote-Yes-to-Lisbon-Treaty.html#>

<sup>173</sup> *Guardian.co.uk* 5 October 2009 at <http://www.guardian.co.uk/politics/2009/oct/05/conservatives-eu-lisbon-treaty-referendum>

that in [their] election manifesto".<sup>174</sup> According to Conservative Party sources cited in the *Guardian*, a Conservative government would:

- Repatriate social and employment powers to a national level. This would effectively mean restoring Britain's opt-out from the social chapter and would need the agreement of all 27 member states
- Demand greater power over justice and home affairs. Under Lisbon these are voted on under a system which gives no member state a veto. France and Germany are likely to resist change here because it would mean unpicking this part of the treaty which gives Britain an "opt in" – the right to refuse to sign up to laws in this area
- Issue a warning to the EU that a Tory government will adopt a hardline stance if its demands are not accepted. This could involve holding a UK referendum on Cameron's more modest proposals or holding up the next round of EU treaties to admit Croatia and Iceland into the union.<sup>175</sup>

David Cameron told GMTV after the Irish referendum: "We want that referendum and I will go on pushing for that referendum and the best way to hold that referendum is if other countries are still discussing it".<sup>176</sup> However, eurosceptics in the party continue to hold Mr Cameron to his referendum pledge, regardless of whether the Treaty has been ratified by all States or not.

### **Finland**

In addition, though not crucial to the implementation of Lisbon, the Legal Committee of the Åland Parliament has not yet reported on the application of Lisbon in this autonomous region of Finland. Local politicians are asking for increased representation and influence in the EU (including a member of the EP) and in Finnish EU affairs. Without Åland's consent the Treaty will not apply in the Islands and it will have no legal relationship with the EU, but Åland's approval is not necessary for Lisbon to come into force in Finland.<sup>177</sup>

## **8.2 Czech Mate?**

President Vaclav Klaus had already indicated that an Irish yes-vote was no longer the only pre-condition for Czech ratification, and the German Constitutional Court ruling on the Lisbon Treaty on 30 June 2009 had not impressed him. He dismissed the German ruling as "predictable"<sup>178</sup> and insisted that the "real question" was:

<sup>174</sup> *Guardian.co.uk* 5 October 2009 at <http://www.guardian.co.uk/politics/2009/oct/05/conservatives-eu-lisbon-treaty-referendum>

<sup>175</sup> Ibid. For interesting Czech and UK scenarios after the Irish referendum, see Professor Steve Peers' blog at <http://blogs.euobserver.com/mahony/2009/09/24/waiting-for-klaus/>

<sup>176</sup> *Telegraph.co.uk* 6 October 2009 at <http://www.telegraph.co.uk/news/newstopics/politics/conservative/6264143/David-Cameron-to-push-for-Lisbon-Treaty-referendum-as-he-denies-split.html#>

<sup>177</sup> See *Grahnlaw* 26 September 2009 at <http://209.85.229.132/search?q=cache:RpqAqQaGEoIJ:www.historybarackobama.com/blogs.html%3Ftag%3Draif+%22%C3%85land+Parliament%22+%2B+lisbon+%2B+treaty+%2B+2009+%2B+%22legal+committee%22&cd=3&hl=en&ct=clnk&gl=uk>

<sup>178</sup> Formal ratification of Lisbon in Germany was delayed by two legal challenges: one from the left-wing coalition, Die Linke, and the other by Peter Gauweiler, a centre-right politician from the Christian Social Union (CSU, a junior partner in the Grand Coalition). The Constitutional Court ruled on 30 June that the Lisbon Treaty was not fundamentally incompatible with the German constitution. However, it called a halt to the ratification process until the German parliament had changed a domestic law to strengthen the role of the legislative bodies in implementing EU laws. The new law was passed on 5 September 2009.

Do we – the citizens of Europe – want greater integration or do we not? Do we want more and more power at a European level or not? Do we want more centralisation in Europe, or not? All this, writes the Czech president, is contained in the European Constitution, now known as the Lisbon Treaty, and fundamental debate over these questions should continue.<sup>179</sup>

Prime Minister Jan Fischer was optimistic about the German Court ruling, regarding it as “an important positive step towards the ratification of the Lisbon Treaty and towards institutional stability of the European Union” and “of crucial importance”.<sup>180</sup>

However, on 17 September Mr Fischer warned that a constitutional challenge to the Lisbon Treaty in the Czech Senate could further delay ratification. *EurActiv* commented that “Pro-Lisbon activists view the Czech senators' proposed complaint as a ploy by Václav Klaus ... to ensure that, even with an Irish 'yes', the treaty's final ratification is delayed long enough to allow general elections to take place in the UK in 2010”.<sup>181</sup>

On 29 September 2009 17 Czech Senators, led by Jiri Oberfalzer (ODS), filed a second complaint against Lisbon with the Constitutional Court in Prague, effectively suspending Czech ratification for some months. The complaint centred on their concerns as to whether the Lisbon Treaty formed the legal basis for the creation of a European ‘super-state’. If so, this would violate the Czech Constitution. The timing of the new challenge, which concerned the Treaty as a whole rather than specific aspects of it, further fuelled speculation among Lisbon supporters that the anti-Lisbon politicians aimed to delay their ratification process until the UK elections, a view that appeared to be supported by one member of the new European Conservatives and Reformists in the EP, Geoffrey Van Orden.<sup>182</sup> However, according to the *EUObserver*, “The court is expected in three weeks' time to set a date for a public hearing on the case. The hearing is likely to take place towards the end of November”.<sup>183</sup>

The Czech European Affairs Minister, Štefan Füle, maintained the new case would simply clarify the constitutional position once and for all and that it would be politically very difficult for the President to ignore the opinion of the Czech Government, Parliament and Constitutional Court.<sup>184</sup> He said in an interview with *EurActiv* on 1 October that once the Court had given its ruling, there ought to be no obstacles left for the President, and he believed the Czech Republic could complete the ratification process by the end of 2009.<sup>185</sup>

After the Irish vote President Klaus declined to say how he would proceed, insisting he could do nothing until the pending Court review was completed. Jan Fischer, on the other hand,

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<sup>179</sup> Radio Prague 2 July 2009 at <http://www.radio.cz/en/article/117918>

<sup>180</sup> Czech Presidency press statement 30 June 2009 at <http://www.eu2009.cz/en/news-and-documents/press-releases/press-statement-of-prime-minister-jan-fischer-on-the-ruling-of-german-constitutional-court--26634/>

<sup>181</sup> 18 September 2009 at <http://www.euractiv.com/en/future-eu/eu-leaders-upset-czech-lisbon-treaty-delay/article-185593>

<sup>182</sup> See *EurActiv* 16 September 2009 at <http://www.euractiv.com/en/future-eu/tory-mep-lisbon-ratification-wait/article-185483>

<sup>183</sup> 3 October 2009 at <http://euobserver.com/9/28773/?rk=1>

<sup>184</sup> *EurActiv* 30 September 2009 at <http://www.euractiv.com/en/future-eu/eurosceptic-czech-senators-put-lisbon-treaty-hold/article-185888>

<sup>185</sup> <http://www.euractiv.com/en/future-eu/czech-eu-minister-prague-ratify-lisbon-year/article-185957>

remained confident that ratification would be completed by the end of the year and his Government assured the EU that it was committed to ratifying.<sup>186</sup>

There have been various suggestions as to how the President might, if necessary, be forced to signing the Treaty. According to the Czech daily *Hospodarske noviny* legal experts have suggested that if Klaus continues to delay, the Government could force President Klaus to sign off the Lisbon Treaty by filing a complaint against him for inactivity.<sup>187</sup> However, Piotr Maciej Kaczyński of the Centre for European Policy Studies (CEPS) recalled the occasion when the Czech President refused to appoint judges because he thought the nominees were "too young", and it had taken two years to settle the case in the courts. The report also quoted a leading Czech Social Democrat, who thought the Government could exert pressure on Klaus by limiting the 2010 budget of the presidential office or by restricting foreign visits.

José Manuel Barroso is reported to have told the former Czech Prime Minister Mirek Topolánek at the end of September that if President Klaus continued to block the Treaty, the Czech Republic would be the State to lose a Commissioner under the Nice Treaty provisions that would prevail.<sup>188</sup> On the other hand, the Polish conservative newspaper *Rzeczpospolita* speculated that the Czech Republic might be offered an influential Commission post in exchange for Klaus's signature of the Treaty.<sup>189</sup>

On 7 October the Czech Constitutional Court rejected one challenge from Senators loyal to President Klaus, about an amendment of the Parliament's Rules of Procedure which requires both Houses to approve any potential transfer of national competences to Brussels by a simple majority vote. The Senators insisted that a qualified majority vote was required, but the Court upheld the amendment.<sup>190</sup>

### 8.3 Swedish Presidency concerns

José Manuel Barroso, the EU President, Fredrik Reinfeldt, and the Czech Prime Minister, Jan Fischer, liaised<sup>191</sup> on 7 October over how to proceed and Fischer sought to dispel fears that communication between him and President Klaus had broken down.<sup>192</sup> The three recognised a need for patience while the Czech constitutional process took its course, but there was also impatience at the delay. The Czech Constitutional Court has agreed to fast track the Lisbon case, with a view to announcing the date of its final decision by mid-October.<sup>193</sup>

The European Council is due to meet on 29-30 October and the Swedish Presidency is hoping to discuss nominations to the main EU jobs in the Lisbon Treaty. Any delay will affect

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<sup>186</sup> *Irish Times* 3 October 2009 at

<http://www.irishtimes.com/newspaper/breaking/2009/1003/breaking6.html?via=rel>

<sup>187</sup> *České Noviny* 29 September 2009 at <http://www.ceskenoviny.cz/news/zpravy/government-can-force-klaus-to-sign-lisbon-treaty-czech-lawyers/399935>. President Klaus had delayed signing the International Criminal Court agreement for several years, finally doing so in October 2008 after a similar proposal from lawyers was made to charge him with inactivity.

<sup>188</sup> *EUObserver* 29 September 2009 at <http://euobserver.com/9/28740/?rk=1>

<sup>189</sup> *EurActiv* 2 October 2009 at <http://www.euractiv.com/en/future-eu/press-fuels-speculation-czech-lisbon-ratification-deal/article-186020#>

<sup>190</sup> *EurActiv* 7 October 2009 at <http://www.euractiv.com/en/future-eu/czech-court-buoys-eu-lisbon-treaty-chances/article-186157>

<sup>191</sup> A meeting was planned but Mr Fischer could not go to Brussels because of technical problems with his plane.

<sup>192</sup> *EurActiv* 8 October 2009 at <http://www.euractiv.com/en/future-eu/eu-leaders-plead-patience-troublesome-czechs/article-186177>

<sup>193</sup> *Ibid*

decisions on the appointment of the new Commission, which is due to take office on 1 November 2009, and the new EU President and foreign and security posts. There are precedents for the Commission mandate being extended, and the current Commission is likely to continue in a caretaker capacity for a while longer, but not as a long-term solution. The mandate of the present High Representative, Javier Solana, expires on 17 October and there is a possibility that he could continue in post. Reinfeldt insists he cannot start consulting on the new Lisbon Treaty posts until he has a clearer idea of Czech intentions.



## **Appendix 1 – European Council Decisions on Ireland**

### **ANNEX 1**

#### **DECISION OF THE HEADS OF STATE OR GOVERNMENT OF THE 27 MEMBER STATES OF THE EU, MEETING WITHIN THE EUROPEAN COUNCIL, ON THE CONCERNS OF THE IRISH PEOPLE ON THE TREATY OF LISBON**

The Heads of State or Government of the 27 Member States of the European Union, whose Governments are signatories of the Treaty of Lisbon,

Taking note of the outcome of the Irish referendum of 12 June 2008 on the Treaty of Lisbon and of the concerns of the Irish people identified by the Taoiseach,

Desiring to address those concerns in conformity with that Treaty,

Having regard to the Conclusions of the European Council of 11-12 December 2008,

Have agreed on the following Decision:

#### **SECTION A**

##### **RIGHT TO LIFE, FAMILY AND EDUCATION**

Nothing in the Treaty of Lisbon attributing legal status to the Charter of Fundamental Rights of the European Union, or in the provisions of that Treaty in the area of Freedom, Security and Justice affects in any way the scope and applicability of the protection of the right to life in Article 40.3.1, 40.3.2 and 40.3.3, the protection of the family in Article 41 and the protection of the rights in respect of education in Articles 42 and 44.2.4 and 44.2.5 provided by the Constitution of Ireland.

#### **SECTION B**

##### **TAXATION**

Nothing in the Treaty of Lisbon makes any change of any kind, for any Member State, to the extent or operation of the competence of the European Union in relation to taxation.

#### **SECTION C**

##### **SECURITY AND DEFENCE**

The Union's action on the international scene is guided by the principles of democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

The Union's common security and defence policy is an integral part of the common foreign and security policy and provides the Union with an operational capacity to undertake missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter. It does not prejudice the security and defence policy of each Member State, including Ireland, or the obligations of any Member State.

The Treaty of Lisbon does not affect or prejudice Ireland's traditional policy of military neutrality.

It will be for Member States - including Ireland, acting in a spirit of solidarity and without prejudice to its traditional policy of military neutrality - to determine the nature of aid or assistance to be provided to a Member State which is the object of a terrorist attack or the victim of armed aggression on its territory. Any decision to move to a common defence will require a unanimous decision of the European Council. It would be a matter for the Member States, including Ireland, to decide, in accordance with the provisions of the Treaty of Lisbon and with their respective constitutional requirements, whether or not to adopt a common defence.

Nothing in this Section affects or prejudices the position or policy of any other Member State on security and defence.

It is also a matter for each Member State to decide, in accordance with the provisions of the Treaty of Lisbon and any domestic legal requirements, whether to participate in permanent structured cooperation or the European Defence Agency.

The Treaty of Lisbon does not provide for the creation of a European army or for conscription to any military formation.

It does not affect the right of Ireland or any other Member State to determine the nature and volume of its defence and security expenditure and the nature of its defence capabilities.

It will be a matter for Ireland or any other Member State, to decide, in accordance with any domestic legal requirements, whether or not to participate in any military operation.

## **SECTION D FINAL PROVISIONS**

This decision shall take effect on the same date as the Treaty of Lisbon.

## **ANNEX 2 SOLEMN DECLARATION ON WORKERS' RIGHTS, SOCIAL POLICY AND OTHER ISSUES**

The European Council confirms the high importance which the Union attaches to:

- social progress and the protection of workers' rights;
- public services;
- the responsibility of Member States for the delivery of education and health services;
- the essential role and wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest. In doing so, it underlines the importance of respecting the overall framework and provisions of the EU Treaties.

To underline this, it recalls that the Treaties as modified by the Treaty of Lisbon:

- establish an internal market and aim at working for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment;
- give expression to the Union's values;
- recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union in accordance with Article 6 of the Treaty on European Union;
- aim to combat social exclusion and discrimination, and to promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child;
- oblige the Union, when defining and implementing its policies and activities, to take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health;
- include, as a shared value of the Union, the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users;
- do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest;
- provide that the Council, when acting in the area of common commercial policy, must act unanimously when negotiating and concluding international agreements in the field of trade in social, education and health services, where those agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them; and

- provide that the Union recognises and promotes the role of the social partners at the level of the European Union, and facilitates dialogue between them, taking account of the diversity of national systems and respecting the autonomy of social partners.

### **ANNEX 3**

#### **NATIONAL DECLARATION BY IRELAND**

Ireland reaffirms its attachment to the aims and principles of the Charter of the United Nations, which confers primary responsibility for the maintenance of international peace and security upon the United Nations Security Council.

Ireland recalls its commitment to the common foreign and security policy of the European Union, as approved on several occasions by the Irish people through referendum.

Ireland confirms that its participation in the European Union's common foreign and security policy does not prejudice its traditional policy of military neutrality. The Treaty on European Union makes clear that the Union's security and defence policy shall not prejudice the specific character of the security and defence policy of certain Member States.

In line with its traditional policy of military neutrality, Ireland is not bound by any mutual defence commitment. The Treaty on European Union specifies that any decision by the Union to move to a common defence would have to be taken by unanimous decision of the Member States and adopted in accordance with their respective constitutional requirements. The Constitution of Ireland requires that a referendum be held on the adoption of any such decision applicable to Ireland and this requirement will not be affected should Ireland ratify the Treaty of Lisbon.

Ireland reiterates its commitment to the ideal of peace and friendly cooperation amongst nations and to the principle of the peaceful resolution of international disputes. It reaffirms its strong commitment to conflict prevention, resolution and peacekeeping, and recalls the record of achievement of its personnel, military and civilian, in this regard.

It reiterates that the participation of contingents of the Irish Defence Forces in overseas operations, including those carried out under the European common security and defence policy requires

(a) the authorisation of the operation by the Security Council or the General Assembly of the United Nations,

(b) the agreement of the Irish Government, and (c) the approval of Dáil Éireann, in accordance with Irish law. Ireland notes that nothing obliges it to participate in permanent structured cooperation as provided for in the Treaty on European Union. Any decision enabling Ireland to participate will require the approval of Dáil Éireann in accordance with Irish law.

Ireland notes also that nothing obliges it to participate in the European Defence Agency, or in specific projects or programmes initiated under its auspices. Any decision to participate in such projects or programmes will be subject to national decision-making and the approval of Dáil Éireann in accordance with Irish law. Ireland declares that it will participate only in those projects and programmes that contribute to enhancing the capabilities required for participation in UN-mandated missions for peace-keeping, conflict prevention and strengthening international security, in accordance with the principles of the United Nations Charter.

The situation set out in this Declaration would be unaffected by the entry into force of the Treaty of Lisbon. In the event of Ireland's ratification of the Treaty of Lisbon, this Declaration will be associated with Ireland's instrument of ratification.<sup>194</sup>

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<sup>194</sup> Presidency Conclusions, European Council 18/19 June 2009 at [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/108622.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/108622.pdf)